

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
EASTERN DISTRICT, AT NEW ORLEANS,
MAY, 1845.

PRESENT :

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

SUCCESSION OF JAMES LAWLER—CHARLES JAMES MCKENNA, Appellant.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

P. Maurian, for the appellant.

Livingston and Duvigneaud, contrâ.

MORPHY, J. Charles J. McKenna has appealed from a judgment, dismissing his opposition to the account presented by the curator of the succession of James Lawler. He claimed to be a creditor of the deceased for the sum of \$1,521 25, for which he had brought suit against the estate some time before, alleging that, for money loaned and advanced to Lawler, at different times, the latter did, on the 2d of February, 1843, make and sign a promissory note to his order, for said amount, payable six months after date, in presence of James McHugh, who signed

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it as an attesting witness. He further alleged, that this note had been lost or destroyed, and was not in his possession, nor under his control; that he never disposed of or transferred the same, and that it was justly due and owing to him, but that he did not know what had become of said note, could not produce it, and that he therefore annexed to his petition a true copy of the same. To prove the existence and loss of the note, the attesting witness, James McHugh, was examined. He states, in substance, that he was McKenna's book-keeper, and transacted his business; that McKenna was a shoemaker, and kept a boot and shoe store, which was destroyed by fire on the 18th of March, 1843, between two and three o'clock in the morning; that on the 2d of February, 1843, he lent to Lawler \$200, which being added to several other small notes the deceased owed him, made up the \$1,521 25, for which a note was drawn by Lawler, which the witness was requested to sign as a witness; that the papers of McKenna, among which was the note sued on, were in a small box, which, he thinks, was not saved; that he saw the box the night before the fire, in the store of the opponent; that the box containing the papers was on the side of the store which was consumed by the fire before it could be extinguished; that the books and some boots, shoes, and furniture were saved; that the box may have been taken away, but that he has not seen it since the night of the fire, &c. Patrick Gallagher testified, that about the end of January, or beginning of February, 1843, he saw the deceased and McKenna in conversation, at the store of the latter; that he saw McKenna put on the counter some money (silver and bank notes), to the amount of about one hundred dollars; that Lawler took the money and immediately executed a note, and called upon James McHugh to sign it as a witness, which McHugh did; that McKenna and Lawler having then left the store together, McHugh showed the note to a friend of witness', who was present, named *O'Kirnans*, telling him, "here is a note of pretty good amount;" that witness then looked at it, and saw that it was a note for fifteen hundred dollars, or something over that amount, &c. Another witness, *Owen Kernan*, who from his name would appear to be the person alluded to by the preceding witness, states,

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that at the end of January, or beginning of February, 1843, he saw Lawler and McKenna in the store of the latter, counting money on the counter—about \$20 in paper and silver; that he did not see Lawler take the money, and does not know for what purpose it was placed upon the counter; and that he afterwards saw McKenna and Lawler go out of the store together. This witness does not state that any note was shown to him by McHugh, nor does the latter mention this circumstance in the very long and detailed account which he gave of all that passed in relation to the execution of the note, and its subsequent loss or destruction by fire. Smith, another witness, testified, that he saw Lawler sometimes in McKenna's store, and that he understood from the deceased that he had had some dealings with him; that, at the time he kept his store, McKenna had lent some money to witness, and then had the means of doing it, &c. The judge of the Court of Probates appears to have totally disbelieved these witnesses for the opponent, so far at least as they testified to the execution of the note sued on. The evidence renders it extremely probable, if not certain, that McKenna, by himself, or his clerk McHugh, did set fire to the store in which the note sued on is said to have been on the night of the fire. Several respectable witnesses say, that they would not believe McHugh on his oath, as, in their opinion, he perjured himself in the criminal court after a prosecution for arson against him was dropped, and he was permitted to become a witness for Charles McKenna, who was accused of the same crime, and who was afterwards tried in that court. The day after the fire, McKenna was arrested in the office of the Western Marine and Fire Insurance Company, where he had procured an insurance on his store. He there enumerated the losses he had sustained in consequence of the fire, and of a robbery which he said had been committed, and made no mention of this promissory note, which exceeded the value of his store, on which he had taken out a policy for \$1200, which he never claimed of the underwriters. It is not shown that, at the time of the fire, or before the institution of his suit, many months after, McKenna ever communicated to any one the loss of this note, or ever claimed its amount of Lawler in his life time; and he gave notice of its loss in the

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newspapers only about eighteen months after it is said to have occurred, and after he had become aware, by the curator's answer to his demand, that such an advertisement was necessary to enable him to recover. The books of the opponent, which were saved uninjured by the fire, were not produced as they might have been, to show that McKenna's book-keeper, and his principal witness, had made, at the time, entries of the loans of money to the deceased, and of the note he is said to have given in payment of such loans. The evidence, moreover, renders it improbable that the opponent had the means of lending such a large amount as that which he now claims. Under these, and other suspicious circumstances disclosed by the record, and the contradictory statements made by the opponent's own witnesses, we cannot say that the judge below was wrong in coming to the conclusion, that the note sued on, and pretended to have been lost, never had any existence.

Judgment affirmed.

THOMAS DUPLESSIS v. HIS CREDITORS, AND THE CREDITORS OF THOMAS
AND JAMES DUPLESSIS.

Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with security, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317.

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APPEAL from the Parish Court of New Orleans, *Maurian, J. Buisson*, for the appellant.

L. Janin, for the defendant in the rule.

SIMON, J. The syndic of the insolvent estate of Thomas and James Duplessis is appellant from a judgment discharging a rule by him obtained on Fergus Gardère, a third possessor of certain property formerly belonging to the said insolvent estate, but which was sold at public auction and adjudicated to W. F. C. Duplessis, to show cause why the said property should not be seized and sold to satisfy a claim of the said syndic, amounting to \$1,359 75, due by the said W. F. C. Duplessis as a contribution to the legal and privileged expenses and charges of the estate, to be paid out of the proceeds of the sale of the property as being subject to a privilege for the payment of the said sum.

It appears from the record that William F. C. Duplessis, who was the holder of notes bearing a first mortgage on certain real property surrendered by the insolvents to their creditors, became the purchaser thereof at the sale made by the syndic. He did not pay the price, but retained it in his hands; and as it had been anticipated that the proceeds of the property sold would be subject to a contribution for the privileged expenses of the estate, the purchaser gave to the syndic an obligation, *in solido* with S. Blossman as his surety, to secure the payment of the amount which he might ultimately have to contribute. The sale to W. F. C. Duplessis *was not recorded* in the office of the Recorder of Mortgages, and *no lien or mortgage was reserved* in the syndic's sale to Duplessis.

In the mean time, the property was sold by Duplessis to François Gardère, and the Recorder of Mortgages *delivered, for the purposes of the sale, a clear certificate of mortgages*; and on the 5th of May, 1840, François Gardère sold the same property to Fergus Gardère, the defendant in the rule.

On the 7th of March, 1842, the syndic filed his account or tableau of distribution, in which he charged the property purchased by Duplessis with a contribution for the legal and privileged charges and expenses, amounting to \$1,359 75, and the *tableau* was duly homologated. Neither Duplessis nor his surety having paid the amount, a rule was taken upon them by the syn-

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dic, and a judgment was rendered against them, *in solido*, for the said sum, being the amount which, according to the *tableau* of distribution, the said Duplessis is bound to contribute. In December, 1842, a *fi. fa.* was issued against Duplessis and Blossman, which was returned as stayed by order of the plaintiff's counsel; and on the 3d of March, 1843, an *alias fi. fa.* having also been issued, the same was returned by order of plaintiff's attorney, as having expired before it could be executed; whereupon, a third writ of *fi. fa.* having been issued, which was levied on the property in the hands of the present defendant, and discontinued by order of the Parish Court, as appears by the sheriff's return, the rule under consideration was moved for and obtained.

We think the rule was correctly discharged. It is not pretended that the third possessor of the property purchased by Duplessis was aware that the latter was bound to pay a part of the price thereof, as a contribution to the amount necessary to pay the legal and privileged charges, and that a mortgage and privilege still existed on the said property to secure the payment of such contribution. Neither the act of sale, nor the *procès-verbal* of adjudication were recorded in the mortgage office; no lien, mortgage, or privilege was reserved by the syndic, who had permitted the purchaser to retain the price, so as to apply the funds to the extinguishment or satisfaction of the mortgage notes which he held against the insolvents; and unless the appellee had expressly assumed the payment of the contribution, we cannot see any reason why he should be made liable for its amount.

Our Civil Code, art. 3238, provides, that the "vendor of an immovable only preserves his privilege on the object sold, when he has caused to be duly recorded, at the office of the Recorder of Mortgages, his act of sale, *whatever may be the amount due to him on the sale*"; and arts. 3314 and 3317 require that all mortgages should be recorded, and provide that such mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records kept for that purpose. Here, when Duplessis sold to François Gardère, the appellee's vendor, who paid him the full price of the property, the Recorder of Mortga-

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ges gave a *clear certificate* of mortgages, because none existed upon his books, as none had ever been recorded; and it is perfectly clear that the failure of the appellant to preserve his mortgage and privilege in the manner directed by law, must have the consequence of disabling him from exercising them on the property in the hands of innocent purchasers who are not personally liable for the debt.

Judgment affirmed.

 THOMAS H. YOUNG v. CHARLES PATTERSON.

After a judgment by default, no dilatory plea can be received.

In an action against the endorser of a note, the signature of the maker need not be proved.

In an action against the endorser of a note, the notary who had protested it, certified, that he had left notices of the protest at the counting-house of defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. A witness introduced by defendant swore, that he was the only clerk of the latter at the maturity of the note, and that he never received any notice of protest. *Per Curiam*: This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which it must be presumed was sealed, and the witness thus prevented from knowing its contents.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Parkhill*, for the plaintiff, cited *Manadue v. Kitchen and others*, 3 Robinson, 261.

Schmidt and Roselius, for the appellant.

MARTIN, J. The defendant is appellant from a judgment against him, as endorser of two promissory notes. He resisted the claim on the ground, that he was not legally cited; that no protest is annexed to the petition; that he has a right to oyer of the protests, and is not bound to answer until oyer be given; that, at the maturity of the notes, they were the property of the Merchants' Bank, which does not appear to have legally transferred its right thereto; that there was no legal protest, or notice; that he was discharged by the plaintiff, having given time to the maker; that the Merchants' Bank is an insolvent corporation, which cannot recover without the intervention of the com-

missioners appointed for the liquidation of its affairs; and that the plaintiff is merely a nominal one, and a man of straw.

The plaintiff filed an amended petition, stating his christian name at full length, the initials of which only preceded his surname in the petition; and that the notes are specially endorsed by John Bellow, junior, and J. H. Young, cashier.

The sheriff returned on the back of the citation, that he served it on the defendant in person. The title of the suit in the citation is, "*J. H. Young v. C. Patterson.*" The amended petition gives us the christian name of the plaintiff at full length. John Bellow, called by the defendant, deposed that he drew the notes sued on, and made some payments, as they became due; he thinks Copland told him the notes belonged to the agency of the Bank of the United States at New York. Copland acted as assistant cashier of the Merchants' Bank at New Orleans, and said the notes were sent to him for collection. Copland said he would receive notes of the Bank of the United States in payment; and, being asked whether he could give an extension of time, said he must write to New York for orders, and that he was directed to send the notes back, if they were not paid.

Copland, a witness of the defendant, deposed, that he was cashier of the Merchants' Bank at the maturity of the notes, and that the latter was the agent of the Bank of the United States. Young was cashier of the Bank of the United States at New York, and sent the notes to Copland for collection. After protest, they were sent back to New York, and they were returned to him for collection from defendant, with whom he made arrangements to pay them by instalments; after which, partial payments were received. No arrangement was made with the maker of the notes to give him time.

The defendant stated in the same instrument, what he urges as exceptions, and in his plea to the merits. A new citation was served on him after the amendment of the petition. The protest of the notes are on file. The document which contains the defendant's exception and answer, was filed after a judgment by default had been taken, which precluded him from a resort to a dilatory plea. The first judge expressed his opinion that the amended petition had supplied the exigencies of the ex-

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ceptions. It does not appear to us that he erred in giving judgment for the plaintiff. The defendant did not deny his signature. That of the maker of a note which he had endorsed, need not have been proven. Nothing shows that the Merchants' Bank had any interest in the notes; that of the Bank of the United States had been transferred by their cashier in New York to Copland, who had endorsed them to the present plaintiff.

The notary has certified that he left notices of the protest of the note at the counting-house of the defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. The defendant introduced a witness who has sworn that he was the only clerk of the defendant at the maturity of the note, and that he never received any notice of protest. This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which we must presume to have been sealed, whereby the witness was prevented from knowing its contents. There is no evidence of any extension of the time of payment to the makers.

Judgment affirmed.

HENRY CZARNOWSKI v. JULIUS CZARNOWSKI.

Novation will not be presumed. The intention to make a novation must clearly result from the terms of the agreement. C. C. 2186.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

MARTIN, J. The plaintiff is appellant from a judgment dissolving partially the injunction which he had obtained against an order of seizure and sale sued out by the defendant, who was the holder of a twelve-months' bond of the plaintiff's. The claim was resisted on the ground that the bond was paid, the plaintiff having given therefor two notes, one for \$220, and the other for \$462, the first of which was actually paid to the defendant. The plaintiff contended that the notes had been received in absolute discharge of his bond; in other words, that

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the debt, of which it was the evidence, was novated by that which resulted from the notes. It does not appear to us that the judge erred, in dissolving the injunction for the balance of the sum for which the order of seizure and sale had been obtained, after deducting the amount actually received by the defendant from the maker of the first note, as the plaintiff failed in his attempt to show that the defendant had consented to novate the debt, novation not being presumed, but being required by law clearly to result from the terms of the agreement. C. C. 2186.

We, nevertheless, think that the interest of the plaintiff ought to have been protected, by the defendant being required to return, or deposit with the clerk of the court for the plaintiff, the note of \$462 in his hands.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed, with costs; but that the appellee shall not be allowed to take out an execution until he shall have either delivered the note aforesaid to the plaintiff, or deposited it for his benefit with the clerk of the court below.

Jennings, for the appellant.

Delavigne, for the defendant.

JEAN CAZEAU V. MARCEL FAGET.

Where, in an action for the settlement of partnership accounts, the defendant, in whose hands the books, accounts, and evidences of debts due to the firm remained at the time of its dissolution, is proved to have admitted that there were outstanding debts due to the partnership to a certain amount, and he states in his answer that he will file a list of them, but omits to do so, and shows no diligence in collecting them, judgment will be given against him for a sum equal to the plaintiff's share in the debts due to the partnership at the time of its dissolution.

APPEAL from the District Court of the First District, *Buchanan*, J.

Barthe, *Murray* and *Castera*, for the plaintiff.

Grivot and *Gaienné*, for the appellant.

MORPHY, J. This is an action brought for a partition and settlement of accounts between the parties, who had formed a

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partnership, and worked together as butchers, during a space of eight or ten months. The pleadings, which are long and prolix on both sides, set forth matters which have not been supported by any evidence whatever on the trial. After hearing a number of witnesses, the judge below was of opinion that, although the profits of the business of the partnership must have been considerable, he had no evidence before him that those profits had been all received by the defendant, as alleged. He accordingly gave judgment in favor of the plaintiff only for \$109, a balance shown to be due to him on a loan he had made to the defendant before they went into partnership; and for \$350, being one half of the sums due to the partnership at the time of its dissolution. From this judgment, the defendant appealed. His counsel urge that there is error in the judgment which should have been in the alternative, condemning the defendant either to deliver to the plaintiff one half of the accounts for the outstanding debts, or, in default thereof, to pay him their amount. Under the circumstances of this case, we do not think that the judge erred. The books, accounts, and evidences of debts belonging to the partnership remained, at its dissolution, in the possession of the defendant, who admitted, in his answer, that there were outstanding debts, and announced that he would file a list of them a few days after. This list he never furnished, nor did he, on the trial of the case, give any account whatever of these outstanding credits, which he admitted to several witnesses amounted to \$700. If he has used no diligence to collect these debts, and they have become wholly, or, in part, prescribed, or worthless, he cannot now be permitted to discharge his responsibility for this sum to the plaintiff, by rendering one half of it in valueless accounts, when he may have received the other half; for it has not been shown that there existed any difficulty in the way of his collecting said debts, or at least a portion of the same.

Judgment affirmed.

Ex Parte Goodwin and another.

EX PARTE ICHABOD GOODWIN and another, Owners of the ship
Glendower.

Where the amount sued for by the plaintiffs is under three hundred dollars, but that claimed by defendant in reconvention exceeds that sum, the reconventional demand will alone be considered on appeal.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The plaintiffs on an allegation that a quantity of curb-stone, imported in their ship, was abandoned by the consignee, obtained a provisional seizure, as a preliminary proceeding to a sale of it for the payment of the freight. The consignee, Geraghty, filed an exception to the suit, denying that the curb-stone had been abandoned, and contesting the legality of proceeding against it; and, in case the action should be sustained, he claimed in reconvention damages on account of the stone having, through the neglect of the master and sailors, been considerably injured, by being smeared with tar. The court gave judgment for the plaintiffs, allowing to Geraghty fifty dollars on his plea in reconvention. The latter appealed.

The first judge did not act on the exception, that is to say, he did not express any opinion thereon. We do not consider the plaintiff's demand, nor the exception thereto as proper objects for our consideration, as the matter in dispute then was under three hundred dollars. The claim in reconvention being for four hundred dollars, is the only part of the case on which our jurisdiction can attach. Our attention is, therefore, confined to the enquiry, whether the first judge erred in limiting the claim in reconvention to fifty dollars. He considered that the testimony was contradictory, and thought that a deduction of fifty dollars on the amount of the freight would be just, there being some evidence that the defendant had offered to pay the freight, if that sum was deducted. We have carefully examined the evidence, and it appears to us too vague to lead us to a different conclusion.

It is, therefore, ordered, adjudged and decreed that the judgment, so far as it allows fifty dollars on the plea of reconven-

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tion, be affirmed, and that the appellant pay the costs of the appeal.

Winthrop, for the petitioners.

Lockett and Micou, for the appellant.

JAMES S. MCFARLANE V. RICHARD RICHARDSON.

APPEAL from the Parish Court of New Orleans, *Mauriam*, J.

MORPHY, J. The petitioner having paid \$1,114, on a judgment obtained by S. G. Blanchard against James Vance, as principal, and against himself as security, was subrogated by the judgment creditor to all his rights against Vance under the judgment. He now brings the present hypothecary action, alleging that, on the 8th of June, 1838, James Vance sold to Mary Conollin, a negro woman named Estelle, or Biddy, and her two children, which slaves he had purchased of John D. Bein, on the 18th of May, 1836; that these slaves were seized in the hands of Mary Conollin, and sold by the sheriff of the Commercial Court to satisfy a judgment against her in favor of Richard Richardson and others, assignees of S. T. Hobson & Co., and were bought of Richard Richardson for \$1,300; that the said slave Estelle, or Biddy, and her four children are in the possession of the defendant, and are subject to his judicial mortgage for \$1,114. The answer, after a general denial, avers that the defendant is the owner and possessor of a certain mulatress named *Biddy*, or *Kitty*, about thirty-seven years of age, with her two children, *Thomas*, a mulatto boy five years old, and *Joe*, a mulatto aged three years, but that he is not the owner or possessor of any such slaves as are described in the plaintiff's petition; that the slaves in his possession were bought by defendant, at a sheriff's sale made in the suit of *The Assignees of Hobson & Co. v. Mary Conollin*; that they had been purchased on the 17th of December, 1833, from the succession of Pierre Romain, by John D. Bein, acting for and in behalf of Mary Conollin; that the defendant prior to purchasing said slaves was informed, that although bought in the name of J. D. Bein, they

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were really purchased and paid for by said Mary Conollin, whose property they continued to be up to the time they were seized in said suit; that said slaves never did belong to James Vance, and never were subject to plaintiff's judicial mortgage, which is not admitted, but on the contrary, is specially denied. The answer further avers that, even if an apparent title to the slaves in the defendant's possession ever existed in said James Vance, no real title was ever vested in him, he being the owner, if at all, merely as agent for said Mary Conollin; that this fact was well known to the plaintiff, who never pretended to any right or claim to said slaves under his judicial mortgage, till defendant was obliged to have them sold in order to enforce the payment of a just debt; that thereupon the said Vance, who acts for Mary Conollin, and represents her in all her business, prevailed upon the plaintiff to institute the present action, which is brought not for his (the plaintiff's) advantage, but for the benefit of Mary Conollin and James Vance, who have a common interest, plaintiff having some private agreement or understanding whereby if this suit is successful, its fruits will be received by the said Mary Conollin. The answer concludes by praying for a judgment, *in solido*, against Vance and Mary Conollin, for the amount of the plaintiff's claim, in case the defendant is condemned to pay it or to deliver up the slaves in his possession. Vance denied his liability, and pleaded the general issue. Mary Conollin made no answer. The court below being of opinion that the plaintiff had not clearly identified the slaves in the defendant's possession, as being those which were owned by Vance, gave judgment for the defendant. In the sale of the 8th of June, 1838, the slaves sold by James Vance to Mary Conollin, are described as "Estelle, a *negro woman*, aged about twenty-eight years, and her two children, Louisa, aged about eight years, and a male infant aged about nine months; the two former having been purchased of John D. Bein, on the 18th of May, 1836, and the latter being born since said purchase." In the advertisement of the sheriff's sale of slaves to be made on the 20th of September, 1842, by virtue of a *feri facias* in the suit of *Richardson & Co. v. Mary Conollin*, they are described as, "the mulatress Biddy, about twenty-seven years

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old, with her four children, *Louisa*, quarteronne girl, ten years old; Thomas, mulatto boy, five years old; Joe, ditto, three years; and Mary, an infant girl, twenty months, &c." From a certificate of the Recorder of Conveyances, it appears that "on the 18th of May, 1836, John D. Bein sold to Vance, Estelle, a negro woman aged about twenty-six years, and her two children, *Louisa*, aged about six years, and Rosina, aged about one year." This certificate does not state from whom J. D. Bein purchased these slaves, a circumstance which would no doubt have appeared from the notarial act of sale, had it been given in evidence. From a sale produced by the defendant, dated the 17th of December, 1833, John D. Bein appears to have purchased from the succession of Pierre Romain "a mulatress, named Biddy, or Kitty, *alias* Estelle, aged twenty-seven years." It is recited in the act that this slave had a child, who was not sold with her, being a *statu-liber*.

By a comparison of these several acts of sale, and by coupling them with the statements and partial admissions of the defendant's answer, the appellant has rendered it very probable, notwithstanding the numerous discrepancies in the names, ages, color, &c., of the slaves mentioned in these acts, that the negro woman Estelle, purchased from J. D. Bein by Vance, and by him sold to Mary Conollin, is the same slave that was purchased by John D. Bein, in 1833, of the estate of Romain, and who was seized at the suit of the defendant in the possession of Mary Conollin, in 1842. This probability is, however, somewhat lessened by a certificate found in the record, in which the Recorder of Conveyances declares that, from the books in his office, John D. Bein does not appear to have alienated the mulatress slave he purchased from the estate of Romain. After the judgment was rendered below, the plaintiff moved for a new trial, and supported it by an affidavit, that he had since discovered testimony to prove that the slaves on whom he seeks to enforce his mortgage, are the same that were conveyed by the estate of Pierre Romain to John D. Bein, by J. D. Bein to Vance, by Vance to Mary Conollin, and by Mary Conollin, by a sheriff's sale, to the present defendant. We think that the judge below erred in giving an absolute judgment in the case against the

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plaintiff, and afterwards in overruling his motion for a new trial. He should have been allowed an opportunity of rendering certain the identity of the slaves in question. Justice requires that the case should be remanded for a new trial.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, and that the case be remanded for a new trial, the appellee paying the costs of this appeal.

Perin and Walker, for the appellant.

Benjamin, for the defendant.

ROBERT C. CAMPBELL v. R. F. NICHOLS.

Plaintiff caused a carriage to be sent to his factors, to be forwarded to him when ordered. They sent it to a dealer in such articles, with instructions to sell it, and he sold it, at private sale, to defendant. It was not proved that the latter knew of the want of authority in the vendors. In an action against the purchaser to recover the carriage, or its value: *Held*, that the defendant acquired no right to the carriage, his vendors having none, nor any authority to convey any; and that the sale was null. C. C. 2427.

It is only after an uninterrupted possession of three successive years, that one who purchased a thing stolen or lost, at public auction, or from a person in the habit of selling such things, can demand the price he paid for it of the rightful owner, who claims the property. C. C. 3472, 3473, 3474.

APPEAL from the District Court of the First District, *Buchanan*, J.

J. C. Clarke, for the plaintiff.

F. Haynes, for the appellant.

D. Byrne, for the warrantors.

MORPHY, J. The petitioner claims a four-wheeled carriage, his property, now in the defendant's possession, or \$400, the value thereof. The defendant admitted that he had the carriage in his possession, but averred that he purchased the same from Dubois and Kendig, dealers in carriages and horses, and that he paid for said carriage \$150 to his vendors, whom he prayed to have cited in warranty. They came in, and averred that when Nichols applied to them for a carriage, there was one at their establishment answering the description of that claimed

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by the plaintiff, which had been sent there for sale by Hart, Butler & Co., of this city; that, at the instance and request of the defendant, this carriage was purchased for him, from Hart, Butler & Co. by Kendig, one of the firm of Dubois and Kendig, who acted in the transaction merely as his agent; and that, therefore, Dubois and Kendig were not his vendors, and cannot be made liable in warranty in this suit. There was a judgment below in favor of the plaintiff for the carriage sequestered, or, in default thereof, for its value, \$150, with interest from the 23d of June, 1841, and a judgment in favor of the defendant against Dubois and Kendig, for a like sum and interest. The defendant, Nichols, appealed.

The evidence satisfactorily establishes the plaintiff's ownership of the carriage. In May, 1840, an agent of his in Mississippi, consigned it to Hart, Butler & Co., commission merchants, at New Orleans, to be shipped to Texas, at such time as the plaintiff should direct. Hart, Butler & Co., contrary to their instructions, put the carriage into the hands of Dubois and Kendig for sale. The latter sold it to the defendant for \$150, but did not represent themselves to him as the agents of Hart, Butler & Co.

It is clear the defendant acquired no right to the property in dispute, his vendors having none themselves, nor any authority to convey any. Hart, Butler & Co. were entrusted with the carriage only for the purpose of keeping and forwarding it to Texas, whenever they should be ordered so to do. They were vested merely with the possession of the thing; no right of property in it ever passed to them; the sale, therefore, they made of the plaintiff's carriage, was null. Civil Code, art. 2427. 18 La. 589. This action was brought in June, 1841. The defendant had, therefore, acquired no right or title by prescription. Civil Code, art. 3472. But his counsel contends that, under the following article, 3473, he is entitled to claim of the plaintiff the price he paid for the carriage, having bought it from a person in the habit of selling such things. We think otherwise. In the first place, the article relied on speaks of things stolen or lost, which form an exception to the rule laid down in the preceding article, which gives title to the possessor of a chattel after a possession of three years; but even with regard to things sto-

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len or lost, it results from the two articles, which have a clear reference to each other, that it is only after a possession of three years that the purchaser can demand the price he paid of the rightful owner who claims his property. Such was the construction put by this court upon those articles in the Code of 1808. *Davis v. Hampton*, 4 Mart., N. S. 288. Code of 1808, p. 488, arts. 75 and 76. This construction is strengthened by article 3474 of the new Code, which declares that, in certain cases therein specified, this reclamation on the part of the owner, even by reimbursing the price, is not allowed, although the purchaser has not possessed the chattel during the time required for the prescription of moveables.

Judgment affirmed.

PENUIEL K. STEVENS V. FRANCIS M. FISK.

A resolutive condition is implied in all commutative contracts, to take effect in case either party fails to comply with his engagements. C. C. 2041.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Emerson*, for the plaintiff.

Upton, for the appellant.

MORPHY, J. This suit is brought to rescind a sale made by the plaintiff to the defendant of one undivided half of his interest in a new invention, called "P. K. Stevens' Accelerating Power Press," together with one half of all the rights and privileges to be conferred on him by a patent he had prayed for. The petitioner states that, among other things and conditions to be performed on the part of said Fisk, he engaged to advance funds sufficient to erect and put into complete operation prior to the first of November, 1841, one of said presses, with all the necessary apparatus; and that, in case the press should work well when thus put up, the said Fisk bound himself to make further advances to get up another press, and to provide suitable buildings and a suitable place for said presses. He avers that although he has fulfilled his part of the contract, the said Fisk refuses to comply with the conditions thereof, and especially to

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put up another press, and to provide the buildings necessary to carry on the business of compressing cotton, and that he will neither execute the contract nor agree to rescind it. The defence is, that the invention purporting to have been sold by the plaintiff is a useless and worthless one, and by no means such as he described and warranted it to be ; that defendant has not neglected or refused to do what he had engaged to do, but that, on the contrary, to his own injury and loss, he has made other and greater advances in money, materials, &c., than were at first contemplated, and this at the special instance and request of the plaintiff, and upon representations of his which have since been found to be false. The defendant avers that these advances amount to the sum of \$900, which he claims in reconvention against the plaintiff. The court below gave a judgment in favor of the latter, and the former appealed.

The record shows that the defendant erected a temporary wooden building in Tchoupitoulas street, put up one press, and worked it a short time, after which he refused to put up another press, or to make the necessary buildings, and abandoned all further operations. The plaintiff called upon him either to go on and execute his contract, or to rescind it, and put him in default on the 25th of May, 1842. The excuse offered by the defendant for his failure to comply with the conditions of the contract was, that the press was worthless, and did not answer the representations made of it by the plaintiff. The latter, in the act of sale, had guarantied that one of these presses, with one horse and two *plateaux*, would press 250 bales of cotton per day in as good a manner as can be done by a screw press. In relation to the usefulness and efficiency of the new press the testimony is contradictory, some of the witnesses pronouncing it a failure, while others considered the machine a good one, and said that with one horse, changed at proper intervals of time, it could press from 250 to 280 bales per day. The testimony and opinion of the latter witnesses receive much weight from an advertisement published by the defendant in the Bulletin, in April and May, 1842, in which he says he has tested the ability of the new lever press to compress cotton, by repeated experiments, invites public patronage, and guaranties to perform with it as well as

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any other press in the city. The object of the parties in making the contract, was clearly to engage in the business of compressing cotton. It was the main consideration for which the conveyance was made to the defendant. By failing to do the things necessary to carry the contract into execution, and by entirely withdrawing from it, the defendant has given plaintiff the right to pray for its rescission. In all commutative contracts the law implies a resolutive condition, to take effect in case either party fails to comply with his engagement. Civil Code, art. 2041.

Judgment affirmed.

THE COMMISSIONERS OF THE NEW ORLEANS IMPROVEMENT AND BANKING COMPANY V. IVES JEWETT.

Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicile or usual place of residence at the time of the inscription, it becomes a vested right (C. C. 3313), and cannot be destroyed by any act of the mortgagor, nor of third persons. Consequently, where the mortgagor subsequently acquired a domicile in another parish, a re-inscription in the parish to which the debtor removes, is not necessary to preserve the mortgage.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Marsoudet*, for the appellants.

McHenry, for the opponent.

SIMON, J. The plaintiffs are appellants from a judgment which sustains the third opposition of F. W. Brewer to the sheriff's paying over to them the proceeds of the sale of a certain slave specially mortgaged to said plaintiffs, but which was also effected by a judicial mortgage of an anterior date, recorded against the defendant, whilst he resided in another parish.

The facts of this case, are these: The defendant, who was a resident of the parish of Rapides, was sued by Lambeth & Thompson in that parish, in the year 1841, and a judgment was rendered against him by the court of the sixth district, at its May term of that year, for the sum of \$5,905, with interest. This judgment was duly recorded in the parish judge's office of the parish of Rapides, on the 29th of June, 1841, and was subse-

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quently transferred to the opponent. In the fall of 1842, the defendant removed his family to New Orleans, and by a notarial act passed on the 12th of January, 1843, leased the St. Louis Hotel for the term of three years, to run from the 1st of November, 1842, at the rate of \$6,000 for the first year, \$8,000 for the second, and \$10,000 for the third. By the said act he gave a special mortgage to secure the payment of the rent, on several slaves, among which there is one named Caroline; and he accordingly took possession of the hotel, which he kept until he was turned out in the course of 1843. He was then sued by the plaintiffs, in whose favor a judgment was rendered against him for \$2,300, on the 21st of June, 1843, and a writ of *fi. fa.* having issued against him on the 6th of September following, the same was levied upon the slave Caroline, who was sold by the sheriff on the 22d of November, for the sum of \$600.

The lease was duly recorded in the mortgage office in New Orleans, and by the certificate of mortgage produced by the sheriff on the day of the sale, no mortgage was declared to exist on the slave but the one resulting from the recording of the lease.

Parol evidence was adduced on the trial below, showing that the defendant came to New Orleans from Alexandria, with his family, on the 10th of November, 1842; that he had with him a negro woman; that he resided in the parish of Rapides several years before he came down to the city; that his family now resides in said parish; that he has alternately resided there himself since 1842, and that he has always had his house there. The witness states that he knew the defendant first in the spring of 1839, that he was then doing business in Alexandria; and it is admitted that the slave Caroline was the only one that the defendant brought to the city, and had in the hotel, belonging to him.

It is not pretended that the defendant has any other property of sufficient value to satisfy the claim of the third opponent, and against which he could exercise his recourse by virtue of his general mortgage (Code of Practice, art. 403); and the only question, therefore, which we have to examine is, whether the subsequent residence of the defendant in another parish, or his

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intention to reside there, and select a new domicile, can deprive the opponent of the benefit of the mortgage by him acquired on his debtor's property, previous to the change of residence of the latter? Or, in other words, was the mortgagee bound, in order to preserve his right of mortgage, to cause his judgment to be recorded in the mortgage office of the debtor's new place of residence?

It cannot be controverted that the right acquired by the opponent on his debtor's property, by the recording of his judgment in the parish of Rapides, where his debtor resided, was perfect, and that the judicial mortgage, resulting from said recording, bore upon all the defendant's property situated in that parish, and upon his slaves in whatever parish they might be found, not only during the period that he resided there, but was yet in full force and operation on the very day that he moved from there to come to New Orleans. Art. 3318 of the Civil Code, says that the inscription of mortgages only binds the property of the debtor, when it has been made, *with regard to slaves*, in the office of mortgages *where the debtor has his domicile, or usual residence*. Here, the act of mortgage executed in favor of the plaintiffs was recorded in this city on the 12th of January, 1843, about two months after the debtor had left his previous residence; and it is declared in the act that the slaves mortgaged are free from all incumbrances and mortgages against the mortgagor, although it was undoubtedly known to the parties thereto that said mortgagor had previously resided in another parish, and had just come to New Orleans to lease and occupy the St. Louis Hotel.

Now, on referring to art. 3374, which treats of the extinction or release of mortgages, we find nothing therein provided for the discharge of mortgages on slaves, when the owner thereof has changed his domicile, and the act of mortgage has not been re-inscribed in the new parish. The law does not require it, and it seems that, on the contrary, such mortgage must have its full effect, when it has been once acquired by the recording of the act in the office of mortgages *of the place where the debtor has his domicile or usual residence*, which clearly means *where the debtor resides at the time of the inscription*; and that such vested right

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cannot be destroyed or discharged but in one of the cases provided for by law. Art. 3333 says, that *the registry preserves the evidence of mortgages during ten years from the day of their dates*, and that they cease to have any effect, if the inscriptions have not been renewed before the expiration of said time; but it does not appear that our legislature ever intended that mortgages on slaves should cease to have their effect, if they were not reinscribed from one parish to another, at every change of domicile of the debtor. This would be requiring more than the law does, and under the principle that a vested right cannot be destroyed but in the manner pointed out by law, we feel no hesitation in declaring at once, though the actual change of residence of the defendant is very questionable, that the renewal of the inscription of the opponent's mortgage in the city of New Orleans was unnecessary, and that his mortgage previously acquired according to law, continued to have its effect on the slaves, notwithstanding the debtor's subsequent change of domicile. In the case of *Hooper v. The Union Bank*, 10 Rob. 63, in which this question was raised, but was not decided, we intimated strongly that we would hesitate long before declaring that a creditor, whose mortgage on slaves has been once legally acquired, by the recording of the act, at the time of its execution, in the parish where the owner then resided, is bound to follow the mortgagor into every parish where he may afterwards think proper to reside, in order to reinscribe his said mortgage; and we could not forbear remarking in that case, that it seemed to us that *a mortgage, when lawfully acquired, becomes a vested right*, which cannot be destroyed by any act of the mortgagor or of third persons. The impression under which we were then, has now become our firm and deliberate opinion upon the subject, and we think that Brewer's opposition was properly sustained.

Judgment affirmed.

 Logan v. The Pontchartrain Rail Road Company.

CORNELIUS A. LOGAN v. THE PONTCHARTRAIN RAIL ROAD COMPANY.

Public notice given by a rail road company that all baggage is at the risk of the owner, not brought home to the owner, will not exonerate the company from liability as carriers.

In an action against a rail road company, to recover the value of baggage lost, it was proved to be the usage on the road for a car to run to the end of the pier forming one of the *termini* of the road, and take from steamers all the baggage and effects of the passengers, and to return to the ticket office, a short distance from the pier, where passengers were at liberty to take off their baggage without charge, the car proceeding with the remaining baggage; and that there was no person employed by the company to take care of the baggage, each passenger being expected to look out for his own. It was proved that the plaintiff's baggage was put on the car at the end of the pier, and that he did not accompany it, but took his passage in the succeeding train. Its loss and value were established. *Held*, that the baggage was lost by the carelessness of the company; that their responsibility attached as soon as the baggage was received on the car at the end of the pier; and that the plaintiff's not accompanying his baggage does not excuse the negligence of the carriers. Judgment for the plaintiff. C. C. 2722, 2725.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Elmore and W. W. King*, for the plaintiff, cited Civil Code, arts. 2722, 2725, 2920, 2934, 2938. Story on Bailments, pp. 27, 41, 46, 57, 304, 305, 308, 315. *Cole v. Goodwin*, 19 Wendell, 252. *Hollister v. Nowlen*, *Ib.* 236. *Clark v. Faxton*, 21 Wend. 153. *Amboy Rail Road Company v. Belknap*, *Ib.* 354. *Baldwin v. Collins*, 9 Robinson, 468. *Kohn v. Packard*, 3 La. 224. 4 Robinson, 381.

Eustis, for the appellants.

BULLARD, J. This is an action to recover the value of the plaintiff's baggage, lost on the defendants' rail road, between the lake and the city of New Orleans. The defendants answered by denying generally the allegations in the petition, or that they were in any way liable under those allegations; and by further alleging that all baggage transported on their road is at the risk of the owners, of which the public, as well as the plaintiff, had due notice. There was judgment for the plaintiff, and the defendants appealed.

The last ground of defence may be disposed of by saying, that

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the evidence does not bring home to the plaintiff any notice, that the defendants expected travellers to take upon themselves the risk of their own baggage; and it is now well settled that such notices as are shown in this case, do not exonerate the carrier.

The facts disclosed in the record are, that the plaintiff, who is an actor by profession, came with his daughter as a passenger on board the steamer Norfolk from Mobile, and arrived at the termination of the rail road on the lake early in the morning. He concluded not to come up to town by the first train, but to wait, until after breakfast, for the next. He had confided his baggage and that of his daughter, consisting in part of their theatrical wardrobe, to the care of the mate of the steamer. It is shown to be the usage of the road for a car to run down to the end of the pier, and take off from steamers arriving all the baggage and effects of the passengers; it is then run up to the hotel, where there is a ticket office. At that place passengers are at liberty to take off their baggage without any charge, and the same car comes up to the city with the remaining baggage and passengers. The plaintiff's baggage was put on board the car at the head of the pier, and received by an agent of the Company; nothing more was seen of it, except one trunk, which was recovered at the dépôt in the city. The plaintiff came up in the next train.

The mate of the steamer, after stating that he had been requested by the plaintiff to take particular care of his baggage, and giving a description of it, goes on to testify, that when they arrived at the lake end of the rail road he had the baggage put on board the car. That it is customary, as soon as the boat arrives, for all baggage to be put on the baggage cars. He is certain the plaintiff's was so. Plaintiff did not go up until the next train. He says the cars are generally at the rail road, and the clerk is sometimes there and sometimes not. None of the rail road agents objected to the reception of the baggage. That the owner of the baggage generally comes with it, and points it out. *The agents of the rail road cannot tell to whom the baggage belongs.* There is some one stationed at the head of the road to deliver freight, and if there is any baggage left it is taken care of until the owner calls for it. The secretary of the defendants

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testified, on his cross examination, that there is no person to take care of the baggage, *each passenger looks out for his own baggage.*

Wilson, an agent of the defendants', testified that no charge is made for baggage; remembers seeing the plaintiff on board. He was promenading the boiler deck with his daughter. When Logan returned from town he complained of the loss of his baggage. He knew it was the plaintiff who was promenading the deck because the witness asked the second clerk if all the baggage and passengers were off the boat, and was answered, yes. He then asked, pointing to the plaintiff and his daughter, who they were? and was told it was Mr. Logan and his daughter, who were to wait for breakfast, and that there was nothing more to go; the car was then waiting.

Thus it appears that the plaintiff's baggage was put on the cars, with the knowledge of the agent that he was not to go up until the next trip; and that such was the management of the business in which the defendants' were engaged in transporting passengers and freight, that no person was employed to take care of baggage, but that each passenger looks out for his own.

Our learned brother of the Commercial Court considered it doubtful, whether the agents of the company were informed that the plaintiff's baggage was put on the car. From the expressions used by the witness it is indeed not clear that he was aware that Logan's baggage was on the car. But the usage was to take all the baggage of all the passengers arriving on steamers, and to carry it up to town, unless taken out at the hotel near the base of the wharf pier.

The court below gave judgment for the plaintiff on two special grounds: 1st. That the defendants received the baggage of the plaintiff, and if they had exercised any system of care in delivering the baggage to the other passengers at the town end of the rail road, they would have discovered this to be surplus baggage, and would have taken care of it for the plaintiff; and 2d., on the authority of the case of *Cole v. Goodwin et al.* (19 Wendell 257) where it is laid down that the carrier is bound to seek out the passenger and deliver his baggage to him, and if

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he cannot be found to keep it for him; and that the negligence of the passenger will not exonerate the carrier from the strict duty imposed on him by law.

Whether we test the rights of the parties by the provisions of our own Code, or by the principles of the law of bailment applicable to common carriers, which prevail in the other States, the result will be the same. We agree with the court below in the opinion that the liabilities of carriers, under articles 2722 and 2725 of the Civil Code, are the same as those defined by the leading cases to which our attention has been called, and particularly those reported in 19 Wendell, 236, 251; 21 lb. 153, 354, and in the case of *Baldwin v. Collins*, 9 Rob. 468.

The loss of the plaintiff's baggage was occasioned undoubtedly by the carelessness and want of system of the agents of the rail road, at that time. In our opinion the single fact, that the plaintiff remained behind until the next trip, perhaps in ignorance whether his baggage had been sent forward, does not amount to such negligence as to excuse the defendants. In one of the cases referred to above (*Cole v. Goodwin et al*) the Supreme Court of New York held, that the carrier was bound to seek out and deliver his baggage to the passenger, or take care of it for him. In this case it is shown that such was the mismanagement of the defendants, that any person so disposed might have taken away the baggage of a passenger at the depôt, without any control from the agents of the Company.

It has been contended that the responsibility of the defendants does not begin until the car arrives at the ticket office, near the hotel; but we are of opinion that it attaches as soon as baggage is received to be transported on any part of the road; and it is shown that the road extends out to the end of the pier, where the baggage is always received from passengers arriving by steamers.

The appellee complains that the court cut down his demand nearly one half, and he prays for judgment for the full amount claimed. It is manifestly impossible to prove with any precision the value of every article of old clothes, especially of a theatrical wardrobe, or even how many were in fact lost. The

evidence does not enable us to say that the court below was so clearly in error as to the value of the lost baggage, as to justify our interference in that respect.

Judgment affirmed.

WILLIAM BARKLEY V. HIS CREDITORS.

The commission allowed to the provisional syndics of the creditors of an insolvent estate, by the 11th section of the act of 20th February, 1817, of "one per cent on the appraised value of the goods and effects confided to their care," is to be calculated on the appraised value of the property as shown by the schedule of the insolvent.

A provisional syndic of an insolvent estate has no other duty to discharge than that of keeping the property surrendered as a deposit, performing such conservatory acts as may be necessary for the interest of the insolvent and his creditors, and demanding and receiving the rents and income of the property, and such debts as may become due during his administration, which expires on the nomination of definitive syndics.

Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163.

The costs of the proceedings, incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate.

APPEAL from the District Court of the First District, *Buchanan, J.*

S. L. Johnson and *L. Janin*, for the appellants.

Blache, for the provisional syndic.

J. L. Lewis, pro se.

Benjamin, for the opponents.

SIMON, J. On the filing of the *tableau* of distribution by the syndic of the insolvent estate of William Barkley, divers oppositions were made to its homologation by the following persons :

1st. By Joseph Le Carpentier, late provisional syndic of the said estate, claiming that the commission accruing to him as provisional syndic should have been calculated and charged at the rate of one per cent on the appraised value of the property surrendered by the insolvent, as per his schedule, to wit, on \$27,000, for which the opponent had furnished the necessary

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bond and security, and not on \$6,250, the proceeds of the sale of said property, and that consequently the same ought to be put down on the *tableau* as amounting to \$270.

2d. By A. Dreux, clerk of the City Court, who, being a creditor of the insolvent for the sum of \$90 37, for clerk's fees, claims to be put upon the *tableau* as a privileged creditor.

3d. By Charles Claiborne, marshal of the City Court, who complains that being a privileged creditor of the insolvent for the sum of \$154 75, for costs due him before the failure by the insolvent, in divers suits instituted before the City Court of New Orleans, he has not been put upon the *tableau*, and he prays to be placed thereon as a privileged creditor for the said sum.

4th. By John L. Lewis, clerk of the court *a qua*, who opposes the homologation of the said *tableau*, because he has not been placed on the same as a privileged creditor for the amount of his costs due by the insolvent as per certificate filed; and he prays to be placed thereon as a privileged creditor for the sum of \$427 95.

These oppositions were sustained below; the *tableau* of distribution was ordered to be amended accordingly; and from this judgment, the syndic and L. B. Macarty, a mortgage creditor of the insolvent, have appealed.

I. The judge *a quo* did not err in allowing to the provisional syndic his commission of one per cent on the appraised value of the property surrendered as per schedule of the insolvent. By the 3d section of the act of 1817 (B. & C.'s Dig. p. 487, No. 3.) it is provided that the schedule of the debtor, to be annexed to his petition, shall contain a summary statement of his affairs, &c., and a statement of all his property, &c., together with a mention of the *approximate value of the property by him assigned*. By the 7th section of the same act, "in case the debtor who applies for its benefit, shall have no property to surrender to his creditors, or if the *appraised value of the property exhibited in his schedule* should not amount to more than one-third of his debts, &c., the judge shall not admit him to the benefit of this act, &c." By the 10th section, the judge is empowered to appoint one or two provisional syndics, and to require from them a bond, the amount of which shall be proportioned to the *value of the estate*

delivered up to them. By the 11th section, which points out the duties of the provisional syndics, it is provided that, *when rendering their accounts*, they shall be entitled to demand, for their trouble and services, *one per cent on the approved value of the goods and effects confided to their care*, and five per cent on the rents and income which they shall have received during their administration. And by the 12th section, all the goods, titles and claims, which the insolvent debtor shall have declared in his schedule, or which might have been sequestered anterior to the appointment of provisional syndics, *shall be delivered up to them*, immediately after their appointment, and *shall remain in their hands*, subject to the same sequestration as before, &c.

From the terms of the several sections of the law of 1817, above quoted, it is manifest that the provisional syndic, whose term of appointment is to expire by the nomination of definitive syndics, and who is only to take charge of the estate of the insolvent debtor, and keep the same until the meeting of the creditors, has no other duty to perform but that of keeping the property surrendered as a deposit, performing all the conservatory acts which may be necessary for the interest of the insolvent debtor and of the mass of creditors, and demanding and receiving the rents and income of the said property, as also the claims which may become due during the time of his administration. He has nothing to do with the sale of the estate. He is a mere depositary, and he takes the property as he finds it upon the schedule of the insolvent, according to the approximate value therein mentioned, which value is to serve as the basis of the amount of the bond which he is bound to furnish. Thus, it is clear, that when the provisional syndic renders his account to the syndics appointed by the creditors, no change has taken place in the property which came under his administration, and that the same is by him delivered over to his successors under the schedule, and in the same state in which it was at the time of the surrender, except whatever increase may have taken place from the rents and income by him received, or from the collections which he may have made. When he delivers the estate to the definitive syndics, the property passes into the hands of the latter, with no other appraisement but that made

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by the insolvent in his schedule, and it is then, says the law, *when rendering his account*, that he is entitled to demand for his trouble and services, *one per cent on the appraised value of the goods and effects confided to his care*, and five per cent on the rents and income by him collected. These expressions of the law necessarily refer to the appraised value of the property as shown by the schedule, according to which the estate was administered, and we are satisfied that they cannot mean any other.

II, III, IV. The question raised under these oppositions has been fully examined in the case of *Rousseau v. His Creditors* (17 La. 206), in which we held, in substance, that, under the Civil Code, law charges are defined to be costs incurred in court in the prosecution of a suit, to be paid by the party cast; and that the creditor is entitled to a privilege when the costs he claims are *taxed costs*, whether in a suit previously to, or in the *concurso* against the insolvent debtor's estate; and we have been unable to discover any reason to be dissatisfied with our former opinion.

With regard to the objection that the costs incurred by the proceedings had on the charge of fraud, which resulted in a verdict and judgment against the insolvent, are not a charge upon the estate, but must be borne by the defendant, who was condemned to pay them, and in his default by the two opposing creditors, we think otherwise. The charge of fraud, though made by one of the creditors, was made in a *concurso*, and was to enure to the benefit of the mass, if sustained; all the creditors were, therefore, interested in the proceeding, and it was the duty of the syndic, if made after his appointment, to sustain the charge, if he believed it to be well founded. 14 La. 458. 5 Rob. 105. This he did, and it is admitted that he joined in endeavoring to sustain the charge, by his counsel's taking a part in the argument. It is clear that the charge of fraud having been established for the benefit of the mass of creditors, and with a view of depriving the insolvent of the benefit of the act, the costs thereof, which are included among the law charges, and consequently privileged, must be paid out of the estate.

Judgment affirmed.

The State v. The Exchange and Banking Company of New Orleans.

THE STATE v. THE EXCHANGE AND BANKING COMPANY OF
NEW ORLEANS.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. This is an appeal by Horace Bean & Co., from a judgment rendered by the District Court of the First District, making absolute a rule taken by Hanna upon the commissioners and Horace Bean & Co., to show cause why certain judgments recovered by the commissioners against York & Ogden, and purchased by Hanna the plaintiff in the rule, should not be assigned to him, after crediting the same with the price of certain lands at Passe Christian, purchased in execution of said judgments, and afterwards sold to Horace Bean & Co.

It would appear that Horace Bean & Co. purchased, at the sale of the assets of the bank, the real estate which had been bought in previously by the commissioners under execution, together with the judgments, "so far only as may be necessary to perfect the title to said property;" and the balance of the judgments was adjudicated to Hanna.

The record does not show what was the price of the real estate purchased at the sheriff's sale, and to what amount the judgments should have been credited. We are, therefore, without the evidence necessary to decide finally upon the rights of the parties.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and the case remanded for further proceedings according to law; and that the appellee pay the costs of this appeal.

Benjamin and Micou, for the plaintiff in the rule.

Barker, for the appellants.

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THEOPHILUS FREEMAN, for the use of George W. Barnes, v. E.
PROFILET.

Where the holder of a note, in consideration of a partial payment by the drawer, grants him an extension of time for the balance, without the consent of the accommodation endorser, the latter will be discharged. C. C. 3032.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

T. Haynes, for the appellant. The holder of a bill, after the liability of the parties is fixed by protest and notice, is not bound to active diligence, and he may forbear to sue as long as he pleases. *Chitty on Bills*, 441. 16 La. 218.

An agreement to give time to the acceptor or drawer, to have the effect of discharging the endorser, must be such an agreement as precludes the holder from suing and suspends his remedy against the drawer or acceptor, to the prejudice of endorser; and must be an agreement binding in law, and founded upon a sufficient consideration. *Chitty on Bills*, 441, [&c. 3 Kent's Com. 111—12. 12 Wheaton, 554. *Huie v. Bailey*, 16 La. 218.

The promise made by the plaintiff in this case, to wait with the drawer for the balance, if he would pay \$2,000, or what he could of the debt, was not such a promise or agreement as was binding in law, not being founded on any new consideration, and was a *nudum pactum*. *Chitty on Bills*, 447. *Bailey on Bills*, 359—60, and notes. 16 La. 218. 1 Gal. 32. 1 Mason, 323. 3 Wash. C. C. R. 70. Also, the late case in this court of the *Bank of the United States v. Dick et al.*

Benjamin and Micou, for the defendant, cited the Civil Code, art. 3032. *Moore v. Broussard*, 8 Mart. N. S. 277. 15 Fenet, Recueil, p. 88.

SIMON, J. The plaintiff is appellant from a judgment discharging the defendant, who was sued as endorser of a draft drawn by P. M. Lapice on Peyroux, Arcueil & Co. to the order of the said defendant, and on account of which the drawer had paid \$2,000 after the protest thereof, from his liability to pay the balance claimed against him.

The ground upon which the appellee was discharged, is, according to his answer, that the appellant had voluntarily abandoned.

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doned his claim against the endorser by granting time and indulging the drawer, for a valuable consideration, without the knowledge and consent of the said endorser.

It appears from the evidence that the draft sued on, was drawn by P. M. Lapice on Peyroux, Arcueil & Co., to the order of the appellee, on the 5th of February, 1841, was made payable eight months after sight, and was accepted on the 9th of the same month; it was endorsed by the appellee, and not having been paid at maturity, was duly protested for non-payment.

The testimony of the drawer shows that, in the beginning of 1842, he paid to the appellant \$2000, and that he told him, at the time of the payment, that he would have to wait with him till the next year for the balance of the note. To this the appellant agreed, and said he would wait. The witness further states that, "he said to Freeman: I am not able to pay the whole amount, but if you will take \$2,000 now, and wait till next year for the balance, I will pay that much; and he consented to this before I paid him the money. He said that he was willing to receive what I could pay, and give me time for the balance; and begged me, at the same time, to do all I could for him, which I promised to do." The witness further testifies that the time that appellant so agreed to wait, was until the crop of the next season was realized; but he thinks that, although he had several conversations with him on the subject, the precise amount of the payment to be made, and time to be given was not definitely arranged, until the interview at which the payment was made. In another part of his testimony, the witness explains the agreement thus: In a conversation with the appellant, at the time of the payment, and before the money was paid, he told him (Freeman) that he could pay him \$2,000 on the claim; that he, witness, had done all he could to raise money; that he must divide what he had among his creditors, and that the amount of \$2,000 was all he could pay then; and that he (Freeman) must wait another year for the balance, to which Freeman consented, but told witness to do all he could for him. This proposition to pay \$2,000 and wait for the balance, came from the witness, and not from Freeman.

This testimony is corroborated by another witness, who testi-

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fies that he was present when the \$2,000 were paid to the plaintiff, and that, at the time of the payment, the latter promised to wait for the balance, but he does not recollect what length of time. He says further that the agreement to wait was made before the sum was paid, and it was so paid to Freeman immediately on the understanding being completed. He cannot say, however, that the payment was made on the condition that the time should be given.

The deposition of another witness establishes that the plaintiff himself told him, about a year after the payment, that he had given time to the drawer for the balance, and that if he had not done so, he would probably have been paid. He further says, that he knows the situation of Lapice at the time of the payment; that, at that time, he does not think that a suit against him would have been available; and that Freeman told him (witness) in conversation, that he had granted time to Lapice on account of the payment of \$2,000.

It is also shown that Lapice had his residence in Natchez, in 1840; that he did business there in 1841; had his plantation in Louisiana, and that the defendant's endorsement on the bill sued on was a mere accommodation endorsement, given to Lapice, the drawer of the same.

It seems evident from the facts shown that the plaintiff, on receiving a payment of \$2000 from the drawer of the draft sued on, agreed and consented to give him further time to pay the balance. The prolongation of such time was to be extended until the crop of the next season was realized, that is to say, about one year longer; and this consent to wait one year was given without consulting the defendant. It cannot be doubted that the plaintiff was bound by his agreement, as his consent had been given in consequence of the payment; and that if he had sued Lapice before the expiration of the time allowed, the latter would have successfully opposed to him the exception, that the suit was premature. The payment of nearly one-half of the claim made by a man who appears at that time to have been greatly involved, who had his residence in another State, or at least transacted his business there, and against whom a suit would not have been available by a man who, perhaps, from the pro-

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crastination of judicial proceedings from one State to another, would have been enabled to delay the final collection of the claim for a number of years, was, in our opinion, a sufficiently valuable consideration for the prolongation of time granted to him for the payment of the balance. The object of the plaintiff in giving the delay, was clearly to receive the \$2000 offered by the drawer—to obtain his share of the money which the debtor had raised and intended to divide among his creditors; and as we may fairly suppose that he would not have granted him any further time to pay the debt, if he had not been informed that a payment of a large portion thereof was to be made if he would allow the delay, it results necessarily that such delay was given in consequence and in consideration of the partial payment, and that the plaintiff was bound to wait until its expiration. We have repeatedly held that if a creditor, by giving a further delay to pay a debt, enters into such an agreement as will disable him from suing the principal debtor, the surety will be discharged; and that the giving further time to the drawer of a note, without the assent of the other parties thereto, has the effect of discharging the latter from liability. Civil Code, art. 3032. 3 Mart. N. S. 598. 16 La. 133 and 218. 5 Rob. 277. In the case of *Moore v. Broussard*, 8 Mart. N. S. 278, this court said that, “the prolongation of the term, suspending the right of suing, enables the debtor to resist the claim of the creditor, who, by granting the indulgence, *deprives himself of the means of enabling the surety, by payment of the debt, to acquire the means of insisting on payment.*” See also 7 Mart. N. S. 13, in which it is recognized, that “there is no rule more clearly or firmly established in relation to negotiable paper, than that *giving time* to any of the parties is a *discharge of every other party*, who, on paying the bill or note, would be entitled to sue the party to whom such time has been given.” See also the case of *McGuire v. Wooldrige and al.*, 6 Rob. 47, and that of *Gustine v. The Union Bank*, 10 Rob. 412, in which the same doctrine was again fully recognized and adhered to.

Judgment affirmed.

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GERMAIN MUSSON v. HENRY D. RICHARDSON, Syndic of the Creditors of William Vance, an Insolvent, and others.

An action to recover the amount of a policy having been instituted against an insurance company, a short time before its dissolution by the expiration of its charter, an answer was filed by the attorney of the company a few days after its dissolution; he shortly afterwards resigned his appointment, and no further proceedings were had for several years. The charter of the company made each shareholder "liable, in his individual and private capacity, to the extent of his shares, in any suit or action pending at the time of the dissolution of the charter, or to be brought thereafter." A few days before the dissolution of the charter, the company transferred, for a certain sum, all its capital stock to another company, which guarantied the stockholders of the old company from all further responsibility as such. The action was tried, some years after, *ex parte*, in the absence of any representative of the company or its stockholders, and without notice to, and in the absence of any one interested in the defence, and judgment rendered in favor of the plaintiff. In an action, by one of the stockholders of the dissolved company, to annul the judgment: *Held*, that the judgment was illegal and void; that the defendants, by the expiration of their charter, had lost all capacity to appear in court; that the plaintiff should have cited the stockholders, in case he intended to exercise his recourse against them under the charter, and have made them defendants, unless he chose to avail himself of the transfer of the stock, and to call the transferees to defend the suit under the responsibility assumed by them; and that the plaintiff in the action of nullity, being still responsible for the debts of the dissolved corporation to the extent of the shares transferred by him to the new company, had a sufficient interest to authorize him to sue to annul the judgment. C. P. 606.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. Janin, for the plaintiff.

L. Peirce and *G. Strawbridge*, for the appellant.

SIMON, J. The object of this suit is to obtain the nullity of a certain judgment rendered on the 13th of June, 1844, in favor of the plaintiff William Vance, against the *Louisiana State Insurance Company*, a corporation whose charter had expired on the 1st of May, 1835. The petitioner states, in substance, that said company was incorporated by an act of the legislature of the 6th of March, 1819, to remain in existence until the 1st of May, 1835. That the said company being still in operation, on the 22d of December, 1834, William Vance insured, in the sum of \$5,000, his commissions on goods that were to be sent and consigned to him in the ship *Springfield*, at and

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from Belfast to New Orleans. That the said ship having been lost, said Vance applied to the company for the amount of insurance, and payment being refused, instituted a suit against them for said amount, which George Eustis, Esq. was instructed to defend, but the answer was only filed on the 5th of May, 1835. That on the 1st of May, the charter expired, and that a short time previous, said company had transferred all its stock to *The Louisiana State Marine and Fire Insurance Company*, for a valuable consideration. That before and at the time of the dissolution of said company, the petitioner held twenty shares of the capital stock, of \$1,000 the share, which were also sold to the said Marine and Fire Insurance Company. That one of the consequences of the sale of the stock was, that the latter should hold the old company secure against any outstanding claims and demands. That according to the 16th section of the charter, the stockholders are made responsible, *at the time of dissolution*, to the extent of their respective shares, and no further, *in any suit or action then pending, or to be brought after the said dissolution*. That since the 1st of May, 1835, the said Louisiana State Insurance Company had no longer any property or legal existence, and could not stand in judgment, and that if the said Vance had intended to prosecute his suit in a valid and legal manner, he should have made the stockholders of the old company, or the Louisiana State Marine and Fire Insurance Company parties defendant to the suit.

He further represents that no step whatever was ever taken in said suit, from the 5th of May, 1835, to the 13th of June, 1844, when the same was tried *ex parte*, and judgment rendered for the amount of the claim; that an execution was lately issued under said judgment, and although the same is nugatory, still, as the judgment might be made, under the 16th section, the basis of a claim against the petitioner, he is interested in having the same annulled and set aside as being contrary to law.

The petition proceeds to state divers facts in relation to the cession of property made to his creditors by Wm. Vance, in 1838, in whose schedule the claim of \$5,000 was included—to the appointment of H. D. Richardson, as syndic—to the *tableaux* of distribution by him filed—to the sale and adjudication of the

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uncollected claims of the insolvent, made on the 23d of July, 1842, to one William Stewart, for \$165 cash, which claims amounted to \$53,665 33, and in which the claim of Vance against the *Louisiana State Insurance Company*, is included; and further alleges that the company had a good defence to the said claim, to wit, that that the greater part of the goods which Vance was to receive on consignment were sent to him by another vessel.

The petition avers that the proceedings had in said suit were calculated to take the parties by surprise, and to defeat their defence; that Wm. Vance, by his cession of property, lost all title and interest in said claim; that either his syndic, or those claiming from him ought to have made themselves parties to the suit; that said suit was placed on the jury docket, and could only be tried as a jury case; that the counsel who had filed the original answer was, in 1844, no longer engaged in the cause; and that the judgment never was served upon any party. It further represents that the *Louisiana State Marine and Fire Insurance Company*, by reason of its purchase of all the stock of the old company, is bound to protect the petitioner against the said claim, and to settle and extinguish the same, and to relieve him from the danger of the contingencies to which he is exposed. That the concerns of the said *Marine and Fire Insurance Company* are now administered by three commissioners, appointed for its liquidation; and that, from the contrivances of the parties herein opposed to him, it is impossible to know for whose benefit the execution was issued, but that he believes Robert Gamble and Isaac Stewart claim to be the owners of the judgment.

Wherefore he prays that said Gamble and Stewart, and the syndic Richardson, and the three commissioners of the *Louisiana State Marine and Fire Insurance Company* be cited; that the judgment complained of be annulled, and that an injunction issue, &c.

Stewart and Gamble filed separate answers, in which they disclaim, respectively, all right, title, and interest in the said judgment. A judgment by default was taken against the syndic; and William Vance intervened in the suit for the purpose

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only of claiming the dismissal of the injunction on divers grounds stated in his petition, and of praying that a judgment for \$12,000 damages might be awarded to him against the plaintiff, and his surety in the injunction bond. This petition of intervention was excepted to by the plaintiff, on the ground that Wm. Vance, in consequence of his cession of property, has no interest in the judgment complained of; that it is not alleged that he ever re-acquired a right thereto; and that the allegations contained in the plaintiff's petition are true and correct. The commissioners of the Louisiana State Marine and Fire Insurance Company answered the petition of the plaintiff, and that in intervention, by pleading the general issue.

Judgment was rendered below in favor of the plaintiff, perpetuating the injunction, and annulling the judgment by him complained of; and from this judgment, William Vance has appealed.

The principal, nay the only question which this case presents, under the pleadings, is, whether the plaintiff has made out such a case as to entitle him to be relieved against the judgment upon which the execution enjoined was issued.

It cannot be doubted that, as one of the stockholders of the Louisiana State Insurance Company, whose charter expired on the 1st of May, 1835, the plaintiff has a great interest in defeating the outstanding claims which may exist against the company. His responsibility results from the 16th section, which makes him *liable in his individual and private capacity to the extent of his shares, in any suit or action pending at the time of the dissolution of the charter, or to be brought thereafter*; and if the judgment complained of was shown to have been properly and legally rendered, it is obvious that the plaintiff would be bound to its satisfaction to the extent of his interest in the stock of the company. It is clear, therefore, that if he has succeeded in establishing the grounds of nullity set up in his petition against said judgment, he has a right to demand that its nullity be declared, and that the injunction issued against its execution be perpetuated.

It appears from the evidence, that the suit alluded to in the petition was brought against the company, of which the plain-

tiff was a member, on the 20th of April, 1835, that the citation was served on the same day, and that on the day that its charter expired (1st May, 1835), the delay for answering was hardly at an end. An answer, however, was filed on the 5th of May, in the name of the company by a counsel, who, being its regular attorney, acted in compliance with his duty, and, we may fairly presume, under the instructions of the then president and directors of the said company. This answer was a general denial of the plaintiff's allegations, and of his having any interest in the thing insured, and an averment that it was small, and that the company was willing to pay him the amount of his interest. The counsel, who filed said answer, resigned his office as attorney of the company before the month of May, 1836, absented himself from the State until 1837, and since his resignation never had any relations with the company, either direct or indirect; and he says in his testimony that, after he resigned, he considered he had nothing more to do with the suit of Vance. The suit stood unacted upon until the 13th of June, 1844, when it was tried *ex parte*, and in the absence of any person representing the company or the stockholders; and a judgment was rendered in favor of the plaintiff, on the evidence by him adduced, for the whole amount by him claimed. It does not appear that any notice was given to any person interested in the defence, except that the counsel who filed the original answer says, that the plaintiff's attorney mentioned to him two or three months before the trial, that he was going to try the case; but he paid no attention to this notification other than mentioning the fact to Mr. P. Forstall, who was said to have charge of the affairs of the company. He did not, however, consider the notification serious.

In the meantime, Wm. Vance sued his creditors; the claim was put upon his bilan; it was sold by the syndic, with a number of other claims, and adjudicated to Wm. Stewart for the benefit of Wm. Vance. It appears also that, in the latter part of April, 1835, the Louisiana State Insurance Company transferred all its titles, rights and interests in the capital stock, to the Louisiana State Marine and Fire Insurance Company, at the rate of \$500 for each share, the stockholders thereof being relieved from

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all further responsibility; and that, on the 27th of the same month, the plaintiff accordingly made a formal transfer of his twenty shares to the latter, to hold the same to their use. It is also admitted that the whole stock of the old company was transferred to the new one, between the 25th and 30th of April, 1835.

And it is also shown that divers communications were had in April, 1835, between Wm. Vance, and the president (John K. West) of the old company, in relation to the claim; and that in May, 1842, some propositions of compromise were made in Vance's name by Mr. West, and declined on the part of the commissioners of the new company.

Without its being necessary to examine thoroughly the question, whether the attorney of the company had any authority to file an answer, even under the instructions of the president and directors, after the expiration of its charter, and to proceed immediately to the trial of the suit, if such had been the case, without its being revived against the stockholders, we are of opinion that the proceedings had subsequently in the said suit, and the judgment rendered in June, 1844, were irregular and illegal, as there was then no party defendant with whom said suit could have been contradictorily tried and decided. The company, by the expiration of its charter, had lost all authority to appear in court and stand in judgment. It had become incapacitated in its collective name to defend the interests of the stockholders, who, by the 16th section of the charter *had, at the time of its dissolution, become responsible in their individual capacities to the extent of their respective shares, in any suit then pending, or to be brought after the said dissolution, for the payment of all debts previously contracted by the said company.* It was then the duty of the plaintiff to cite the stockholders against whom he intended to exercise his recourse under the charter, and to make them parties defendants; unless he chose to avail himself of the transfer of the stock made to the new company, and to call the latter to defend the suit, under the responsibility it had assumed in the act of transfer. The plaintiff did not think proper to do either; but after having permitted his action to lay dormant for the space of nine years, he proceeded, *ex parte*, to the trial thereof, and obtained the judgment which he now seeks to man-

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tain against one of the stockholders. This he had no right to do. In the case of *Bernard v. Vignaud*, 1 Mart. N. S. 9, this court held, that a judgment rendered against a party legally incapacitated to defend himself (and here the old company had lost such capacity), ought to be considered as one rendered *without parties*, and absolutely void. So it is when the defendant dies, even after issue joined, the case cannot be proceeded in without citing his heirs or representatives to defend the action, and the attorney of the deceased has no right to carry on the suit after the death of his client. It must be revived against his heirs. Code of Practice, art. 120. 3 La. 527.

Now, art. 606 of the Code of Practice, informs us, that a judgment can be annulled, when it has been rendered, *even contradictorily*, against a person *disqualified* (*qui n'avait pas capacité*), *by law from appearing in a suit*, and when the defendant *has not been legally cited*. Here, the company had been disqualified by law. It could no longer appear in the suit. The answer filed in its name could not be considered as having any such legal effect on its capacity as to enable it to defend the suit after the dissolution of the charter. The stockholders were not cited; and it seems to us clear, that the judgment complained of, even supposing it to have been pronounced contradictorily with the old company, under the issue joined on the 5th of May, 1835, is illegal and void, and that the injunction ought to be maintained and perpetuated.

Judgment affirmed.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

In annulling a judgment on the ground of the neglect of the plaintiff to make the proper parties, after the defendants, an incorporated company, had become, pending the suit, incapacitated to appear in court by the expiration of their charter, the Supreme Court will not declare the proceedings invalid only from the date of the dissolution, and reserve to the original plaintiff the right to make other parties and to proceed with his action. The judgment complained of being the only matter in controversy, if illegal, it will be simply annulled.

G. Strawbridge, for a re-hearing. The court having deter-

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mined that the plaintiff had an interest in the cause, which authorized him to maintain an injunction, I would respectfully inquire, whether any member of the court has read the document, to be found at page 36 of the record, being nothing more or less than a copy from the books of the Insurance Company, of a transfer of Mr. Musson's twenty shares, *on the 27th day of April, 1835?*

This was not only proof enough at least against Musson and the two Insurance Companies, that he was not the owner of the said twenty shares, *on the 1st May following*, but estopped them in law from so declaring. Consequently Musson was not one of "*the persons composing the said company at the time of its dissolution,*" who, in the language of the 16th section of their charter, are "*responsible in their individual and private capacities,*" &c. It is alleged and shown that Musson had but twenty shares, and under the 16th section had just the two hundred and fiftieth part of Vance's debt to pay. For what reasons, or under what law was he permitted to enjoin the execution for the whole debt? The court has not noticed this point.

Should these reasons fail to influence the court, still the judgment should be amended so as to invalidate only the proceedings since the 1st of May, 1835, reserving the right to make other parties.

SIMON, J. The appellant's counsel, in his petition for a rehearing, attempts to controvert our opinion, that the plaintiff had an interest in the cause, which authorized him to maintain an injunction against his proceedings, and thinks proper to inquire, "*whether any member of this court has read the document, to be found at page 36 of the record, being nothing more or less than a copy from the books of the Insurance Company of a transfer of Mr. Musson's twenty shares, on the 27th of April, 1835?*"

If the counsel had taken the trouble of reading the whole opinion of this court, he would have ascertained that the fact, to which he now adverts, with the indirect and unfounded imputation of its having been overlooked, is not only noticed *at full length* in the said opinion, but that we have also noticed a very important fact exhibited by the record, as admitted by the counsel of the parties, to wit, "*that the whole stock of the old company*

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was transferred to the new one, between the 25th and 30th of April, 1835." According to the position which he assumes, it would necessarily follow that, not only Musson had no interest in the stock of the company, on the 1st of May, 1835, the day on which the charter expired, but that the whole company was extinct before that time, and that, therefore, there was, at the time of its dissolution, no person composing the said company. The counsel, however, appears to have lost sight of the fact, that the suit against the old company *was pending at the time of the transfer* made by Musson and by the whole company to the Louisiana State Marine and Fire Insurance Company; that *the citation was served* on the 20th of April, previous to the transfer; and that, under the *sixteenth section* of the charter, the stockholders, had, at the time of its dissolution, become responsible in their individual capacities, to the extent of their respective shares, in any suit *then pend'ng*, for the payment of *all debts previously contracted by the company*. It is undoubtedly true that Musson's shares, as well as those of the old company, did not belong to them at the time of the dissolution of the charter, and that the same were then owned by the new one; but this is one of the very reasons which induced us to decide that it was the plaintiff's duty to cite the stockholders against whom he intended to exercise his recourse under the charter, or to avail himself of the transfer of the stock made to the new company, and to call the latter to defend the suit under the responsibility it had assumed in the act of transfer. Under the facts and circumstances insisted on by the appellant's counsel, had he any right to proceed to judgment against the old company, of which Musson was a member, *at the time of the citation*? Surely not. It was dissolved, and the stockholders thereof had parted with their interest in the stock several days previous to the expiration of the charter. Why then did he obtain his judgment against the old company, in June, 1844? and why did he issue an execution against it? If Musson did not possess any further interest in the stock after his transfer, and had nothing to do with the judgment, was not the old company equally disinterested, in consequence of the transfer of the whole stock, made at the same time, and to the same company? Clearly so; and strongly

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impressed with the idea, that no judgment could be legally obtained against a company, which, though legally cited whilst its charter was in full operation, had subsequently become disinterested in the suit by the transfer of the whole stock, and disqualified from appearing in it by the expiration of its charter, and with the belief that the judgment and execution enjoined, though rendered and issued against the Louisiana State Insurance Company under its corporate name, are virtually intended to have their effect against the persons composing said company at the time of the service of the citation, the debt sued on having been contracted previous to the transfer and dissolution, we must again conclude, that the appellee, as one of the old stockholders, has a right to demand that its nullity be declared, and that the injunction issued against its execution be perpetuated.

With regard to the counsel's demand that we should only invalidate the proceedings since the 1st of May, 1835, reserving to his client the right to make other parties if he sees proper to do so, we think we have no right to make any such reservation, and to express any opinion by which we should permit the appellant, in an action of nullity, to reinstate his suit on the docket of the court in which the judgment complained of was rendered. He may, perhaps, have a right to do so on application to the court *a quâ*; but we conceive that we have no authority in this case to reserve or to order it; and as the judgment complained of was the only matter in controversy in this suit, it suffices for us to say that said judgment was illegally obtained, and that it was properly annulled in the lower court. This is the only purport and extent of our judgment.

The re-hearing is, therefore, refused.

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THE MISSISSIPPI MARINE AND FIRE INSURANCE COMPANY v. THE
BANK OF LOUISIANA.

An action before the Commercial Court to annul a sale made by the sheriff of a District Court, and exception that the former court cannot annul, or set aside the proceedings of the latter: *Held*, that so far as the judicial proceedings of the latter are concerned, the Commercial Court is without jurisdiction; but where the executory proceedings of a sheriff are set up by defendants as the basis of their title, they may be examined, and set aside if illegal.

Where the notice of seizure under a *fi. fa.* is illegal, the sale will be set aside.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The defendants having obtained a judgment against the plaintiffs, in the District Court of the First District, on a note secured by the pledge of certain shares of the stock in the Bank of Louisiana, caused the same to be seized and sold by the sheriff, and, through an agent, became the purchasers thereof. The present action was instituted before the Commercial Court. The petitioners pray that the sale may be declared void, and that they may be declared the owners of the things sold. The material facts disclosed by the pleadings and evidence, are recited in the opinion delivered by GARLAND, J.

Lockett and Micou, for the appellants. The judge of the Commercial Court and the counsel for the defence insist that Chas. Harrod was the *last* president of the Insurance Company, and that service upon him was therefore good. *Non sequitur.* Service must be made on the president, *in office at the time of service.*

It is not true that Harrod was the last president. The minutes of Nov. 29, 1838, contain his formal resignation, and the appointment of Lockett as his successor, *pro tem.* On the 21st January, 1839, Lockett's functions were continued, by resolution; and on the 13th May, 1839, the liquidation of the company was placed under the control of the *president and two directors*, Lockett then being the president. At the meeting to resolve upon the liquidation, the Bank of Louisiana appeared as a stockholder, through H. C. Cammack, its attorney in fact. The functions of the president were not suspended. The only change made was, that a committee of the board was named to advise with him, instead of a full board. The president remained the

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head of the corporation, and the only person competent to act as its officer. He was so named with the concurrence and consent of the Bank of Louisiana as a stock holder of the Insurance Company, and so recognized in their judicial proceedings. The other members of the committee had no other powers or functions but those of directors. Consequently no legal service of judicial process, or notice, could be made upon them.

In all the proceedings in the District Court, before the sale complained of, Lockett was recognized as the president; and, in that capacity, he executed the note and pledge on which the suit was based. Can the bank, after thus transacting with a person known to them as the chief officer of the company, pass over him, and, in a most important proceeding, serve notice upon some other? It is not even shown that notice came to the hands of C. Harrod. The sheriff says only, that he delivered it to Mr. Heyl. It is proved that Heyl was *not* an officer of the company; that he was a clerk at the Atchafalaya Bank; that the Mississippi Insurance Company had no office there; and finally, that he had no recollection of ever seeing the notice in question, or of delivering it to Harrod.

The judge of the Commercial Court says that the receipt of the notice ought to have been negatived on oath. If such a suggestion had been made on the trial, the company would certainly have tendered the affidavits of Lockett and Harrod; but it is obvious, that they could not have been witnesses for the plaintiffs, if objected to, being stock holders of the company. The bank might have called upon them, and ought to have done so, as it held the affirmative in the attempt to cure a service, illegal on its face.

The Code of Practice requires that three days' notice of a seizure be given to the defendant, before advertisement. The mode of giving notice is not fixed. It must be decided by analogy. Citation can only be served upon the president in person, or upon some other officer *at the office of the corporation*. Notice of seizure and intention to sell, must be given in the same manner. Code of Pract. art. 198.

It is objected that it was not necessary to give notice, because the stock was already pledged for the debt.

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It was decided in *Grant and Olden v. Walden* (6 La. 623), that the three days' notice was necessary in cases of seizure and sale of property specially mortgaged for the debt. This decision was affirmed in the case of *Saillard v. White* (14 La. 84), and has ever since been acted upon as the law. Parties interested have a right to expect a compliance with this form, and it would be unjust to deprive them of its advantages. The necessity of notice is greater in cases of pledge than of mortgage. In the latter, the property being in possession of the debtor, the very act of taking it out of his possession, gives him notice of the seizure. In cases of pledge, the property being in the hands of the creditor, he may place it in the sheriff's hands and cause it to be sold, *without the knowledge of the owner*, unless required to give him notice. Thus the most injurious sacrifices might occur. This case is a signal instance, in which the property of a debtor has been sacrificed, and purchased by the creditor for less than *one-third of its admitted value*.

The counsel for the defendant contends that the stock having already been seized under previous executions, remained under seizure, and that no new notices were required, when seized under the last execution.

The seizure of the sheriff made under execution expires with his writ. It was so decided in *Rothschild v. Ramsay* (2 La. 80), the very case cited by the defendant's counsel. The first writ was issued on the 29th November, 1841, a levy on the stock was made under it, and the writ was returned *stayed*, on the 5th Monday of January, 1842. The second writ was issued 6th October, 1842, and was returned stayed by the plaintiff, on the 3d Monday of November, 1842. The third writ was issued 23d February, 1843. Seizure was made in the hands of F. B. Conrad, assignee, and was returned on the 2d Monday of April, 1843. The fourth writ, under which the stock was sold, was issued 15th April, 1843. So that from the 5th Monday of January, 1842, until April, 1843, there was no seizure or proceedings whatever existing against the stock pledged to the bank, and during a great part of the time, no writ in the sheriff's hands. Is it possible that the court can countenance the doctrine, that notices will be presumed to have been correctly given under

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the one writ, and that this presumption will cure the defect of notice under another writ, issued fifteen months afterwards?

The stock never was seized. To make an effectual and valid seizure, the sheriff must take possession of the property seized. If it consist of credits or incorporeal things, possession of the title should be taken. The sheriff should take the same possession that would be necessary to complete the title of a purchaser. Civil Code, art. 2457. The certificate of stock was never taken into the possession of the sheriff, nor was it exhibited at the sale. Bidders might have been deterred from bidding for stock, the certificates of which were not shown. It may be presumed that if the certificates had been exhibited, greater confidence would have been felt in the title; that the plaintiffs would have found some competitor at the bidding; and that the property would not have been sacrificed.

L. Pierce, for the defendants. The Commercial Court had no jurisdiction. This suit should have been brought in the District Court. The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. The execution of process is a part of the proceedings in a suit. According to the regulations of the Spanish laws, on the subject of execution, when the judgment of a court has to be executed even within the jurisdictional limits of another, on opposition made to the proceedings on grounds wholly incidental to the original cause, the claims and rights of the opposers were to be decided upon by the judge who held cognizance of the principal suit. 8 Mart. 63.

The first objection made by the Insurance Company is not sustained. The minutes of the company (Deliberations of May 3d, 1839,) show that Harrod was the last president. If the subsequent proceedings of some of the stockholders were beyond their powers as members of the corporation, and the liquidating committee a nullity, which is believed, the notice was good upon Harrod. If the liquidating committee exists, as they appear in the case in the District Court, and Harrod, Hodge and Lockett were the committee, service upon Harrod was good, for notice to one of the committee was notice to all. That it was duly served upon him is proved by Heyl's testimony, who de-

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poses that he always placed on the table of Harrod all papers left for him, without reading them, and the minute book shows that there was no office of business. But the plaintiffs are barred by their own proceedings in the District Court. On the 8th December, 1841, this pledged stock was seized by the sheriff, and \$2,040 made besides upon the writ, which was paid to the defendants. This writ was stayed, but the seizure still continued. Under the common law a *venditioni exponas* would have afterwards issued. Under our system *alias* and *pluries fieri facias* are the common writs. This seizure of the stock, in December, 1841, is not complained of, either in the District Court, or in the present petition; and there was no necessity of notice on the *alias pluries* writ. 2 La. 280.

There is no necessity for advertisements to be made by posting on the church door or court house door. Acts of March 9, 1835, and March 11, 1837. Bullard and Curry's Dig. p. 9.

There is no law requiring the sheriff to take manual possession of the certificate of stock, nor was it necessary for the purposes of justice. The purchaser would have been entitled, on the production of the adjudication of the sheriff, to have transferred to him the 170 shares on the books of the Bank of Louisiana, and to receive a certificate in his own name, and the certificate in their possession would of course be cancelled. The certificate was annexed to the act of pledge, and whether in a notary's office, or in the cashier's acting as notary, could not be separated from the act of pledge until the ownership was changed by a *sale*.

GARLAND, J. The object of this suit is to annul and set aside a sale made by the sheriff of the District Court of the First District, of one hundred and seventy shares of the stock of the Bank of Louisiana, purchased by that institution, and to obtain a judgment decreeing the shares to belong to the plaintiff. The facts are, that the bank discounted a note for upwards of \$20,000, drawn by the company, the payment of which was secured by the pledge of 170 shares of the stock of the Bank of Louisiana, and a number of shares of the Bank of Orleans. Suit was brought on the note, in the District Court, a judgment obtained, and various executions issued, under the last of which the 170 shares of stock were seized and sold by the sheriff, and purchased

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by the agent of the bank. The Insurance Company now alleges that said sale is a nullity : *first*, because no legal notice of seizure was given ; *secondly*, because the property was not legally advertised ; *thirdly*, because the sheriff did not, when he sold the stock, have it or the certificate therefor in his possession, and did not exhibit it to the bidders or purchasers at the sale ; *fourthly*, because no appraisalment was made of the stock previous to selling it, and because, generally, the requisitions of the law have not been complied with.

The defendants excepted to the jurisdiction of the Commercial Court, and aver that it cannot annul or set aside the proceedings of the District Court ; and further, that there is no president or directors of the Insurance Company, nor any person authorised by law to institute this suit. As the defendant's counsel was not present when this exception was tried the court over-ruled it, the judge saying, in his reasons for his judgment on the merits, that he presumed it was abandoned. The case was tried on the merits, and a judgment given for the defendants, from which the plaintiffs have appealed.

On the trial it was proved that Henry Lockett signed the note sued on, as the president, *pro tempore*, of the Insurance Company, The citation was served on him when the suit was instituted, and he does not appear even to have been superseded in that office. The notice of seizure was not served on him by the sheriff ; but the sheriff returns, that written notice of seizure was left at the office of Charles Harrod, president of the company, in the hands of Mr. Heyl, on the 12th of May, 1843. At this period it is shown that Harrod was not the president of the company, nor had he been for several years. Heyl is not shown to have been an officer of the company, nor is it pretended that he was. No advertisement was posted on the door of the church, nor of the court house ; and no appraisalment was made previous to the sale.

As to the exceptions filed by the defendants, we are of opinion that the court did not err in overruling them. The first is, that the Commercial Court cannot annul or set aside the proceedings of the District Court. This is true, so far as the judicial proceedings of the latter tribunal come in question ; but it is not the case where the executory proceedings of the sheriff are set

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up as the basis of a title to property claimed to have been alienated. Here the defendants set up the proceedings of the sheriff as giving them a title, and we are of opinion that the Commercial Court has power to examine them, to see if the requisites of the law have been complied with. It is an every day occurrence for courts to look into the proceedings relating to the disposition of the property composing successions, when set up as giving a title. The case cited by the counsel from 8 Martin, 63, does not sustain his position.

The second exception is rather an unfortunate one for the defendants. The president of the company, and those representing it in this action, are identically the same persons with whom the bank made their contract, and against whom they brought suit and obtained a judgment. No other president or directors seem to have been chosen since, and the charter says, that when a president and directors are once selected, they shall serve until others are elected to replace them. The corporation is not dissolved by a failure to elect directors by the stockholders. 1 Moreau's Dig. 603, sec. 6.

Upon the merits of the case we cannot agree with the judge of the Commercial Court, that the evidence establishes that Harrod was the president of the company, that his place of business was the place of business of the corporation, and that the notice of seizure came to his hands. The contrary of these positions is the true state of the case. The minute book of the company, which is in evidence, shows that Harrod resigned as president of the company, on the 29th November, 1838, and that Lockett was appointed his successor. Harrod, in 1843, had a situation and office in the Atchafalaya Bank, with which the Insurance Company had no connection, so far as we are informed. He was one of the liquidating committee, it is true, but not the principal member, or chairman. The sheriff does not say either in his return, or evidence, that he gave a notice of seizure to Harrod; on the contrary, he says it was handed to one Heyl, who never had any connection with the company, and who, when examined, does not say that he gave it to Harrod. He swears that he was employed in the Atchafalaya Bank, and that when persons came there with papers for Harrod, he laid them

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on his desk, without ever looking at them. He never saw any notice at all. Admitting that Harrod was the proper person to whom the notice should have been given, this was not a sufficient service of it. Code of Practice, art. 198.

We are of opinion that the notice of seizure was illegal; and the sale made under it consequently confers no title on the defendants. There are other grounds of nullity; but it is not necessary to state or decide them.

The judgment of the Commercial Court is, therefore, annulled and reversed, and it is ordered and decreed that the sale made by the sheriff of the District Court to the defendants, of the one hundred and seventy shares of the stock of the Bank of Louisiana, be annulled and set aside, as being illegal; and that the plaintiffs recover the same, subject to the pledge in favor of the Bank of Louisiana, and the judgment in their favor, and the privilege acquired by the seizure; the appellees paying the costs in both courts.

JAMES BARNES DIGGS v. DENIS PRIEUR, Recorder of Mortgages for the Parish and City of New Orleans.

A bankrupt, discharged by a District Court of the United States under the act of 1841, has a right to have the mortgages recorded against him for the purpose of securing debts from which he has been discharged, erased, so far as they may effect his future property. And where a rule has been taken in the District Court on the recorder and the mortgagees, to show cause why the mortgages should not be erased, and no cause has been shown, and the rule has been made absolute, and the recorder refuses to make the erasure, a mandamus may be obtained from a state court to compel him to do so. *Per Curiam*: As the debts secured by the mortgages cannot be recovered but in the event of the certificate being annulled for fraud, it is unjust, in the absence of any such charge, that the mortgages should stand recorded as operating on the future property of the bankrupt.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Elmore* and *W. W. King*, for the applicant, cited the 4th sect. of the bankrupt act of 19th August, 1841. Civil Code, arts. 3335, 3336, 3337, 3342, 3346. *Conrad, Assignee, v. Prieur, Recorder*, 5 Rob. 49.

Roselius, for the appellant.

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GARLAND, J. James B. Diggs became a bankrupt under the act of Congress, passed in 1841. An assignee was appointed to take charge of his estate, and a discharge given to the bankrupt. The assignee took a rule in the District Court of the United States on several creditors who had conventional and judicial mortgages recorded in the office of the Recorder of Mortgages, to show cause why their mortgages should not be erased, for the purpose of selling the same.* The creditors showed no cause at all, and the order was granted. With this order, or decree of the District Court of the United States, and his discharge, the bankrupt called on the defendant to erase the mortgages recorded previous to his discharge. This the defendant, who is Recorder of Mortgages, refused to do; whereupon Diggs presented his prayer for a mandamus commanding the recorder to erase the mortgages. To this rule the Recorder answered by a denial of the jurisdiction to the United States District Court, to grant such a decree. The judge below said, that he was satisfied that Diggs had received his discharge under the bankrupt law, and that the District Court could very properly give effect to that discharge, by ordering a cancelling of all mortgages recorded against the bankrupt, and thus give effect to his certificate. The judge says that this proceeding is very similar to a suit upon a judgment of another court, which may be brought and prosecuted to judgment and execution; he, therefore, awarded the mandamus, and the Recorder has appealed.

We are of opinion that the inferior court did not err. An opportunity was given to the creditors to make opposition to the application in the United States Court; they made no objection; and the bankrupt being discharged, is entitled to the benefit of his certificate; and it is not proper that mortgages should stand upon the records, effecting any future property the bankrupt may acquire.

The certificate granted to Diggs operates as a discharge of his

*The rule was taken by the bankrupt—not by the assignee; and the mortgagees were ruled to show cause “why the mortgages standing in their names should not be cancelled.” The rule does not state that the erasure was for the purpose of selling the property.

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debts, except those of a fiduciary character, contracted at any time previous to the filing of his schedule in the United States Court, unless, in some subsequent action, it shall be shown that the certificate was fraudulently obtained. It is, therefore, not legal nor just, in our opinion, in the absence of any charge of fraud against the bankrupt, that mortgages should stand recorded, operating on future property, when the debts secured by those mortgages cannot be recovered, except upon the contingency of the certificate being impeached, and annulled for fraud in procuring it.

Judgment affirmed.

URSIN PREVOST and others v. RICHARD G. ELLIS.

To make out a title by prescription, such as will authorize a recovery in a petitory action, where possession has been decreed to be in the other party, plaintiffs must, at least, show clearly that, before possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession, a sufficient length of time, under a just title, with proof of the exact commencement of that possession. C. C. 3452, 3453.

The seventh section of the act of 25th March, 1810, requiring notarial acts concerning immovable property to be recorded in the office of the parish judge where the property is situated, was not repealed by the promulgation of the Civil Code. Under that act, contracts of sale of real property, not recorded, are void as to third persons.

As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the act, as by proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness.

Proof, by a subscribing witness, that an act of sale of real property *sous seing privé*, was signed and executed on the day of its date, is insufficient to give it effect from its date, as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties.

A witness holding other property under a title through which the party offering him claims the property in litigation, has an interest in the question rather than in the case; and any objection on that account goes to his credit, and not to his competency.

APPEAL from the District Court of Terrebonne, *Deblieux, J.*
Bodin, for the plaintiffs.

Beatty and *C. A. Johnson*, for the appellants.

BULLARD, J. The tract of land, the title to which is in contro-

versy in this case, is the same which formed the object of a possessory action between the same parties, which was decided by this court at the July term, 1841, in favor of the present defendant. See 19 La. 251. Thereupon the defendants in that case, now plaintiffs, instituted the present petitory action.

The plaintiffs assert title to a tract of land of forty *arpents* front, by a depth of forty on both sides of the bayou Grand Caillou, in the parish of Terrebonne, bounded below by lands of Guillaume Darbonne, and above by land now possessed by Thomas Butler, which their ancestor, Joseph Prevost, *dit* Collette, purchased of one Robert Brazil, by public act of sale passed in the county of Attakapas, before Louis De Blanc, then a justice of the peace, who was generally reported to be a notary, and exercising the functions of one, before two witnesses, dated the 12th of May, 1806, at which time he took possession. They represent that he remained in possession until his death, and that they, the plaintiffs, his heirs, have possessed the same in good faith, publicly and peaceably, as owners, for more than thirty years. In a supplemental petition, they allege ownership by the prescription of twenty years.

The defendant, in his answer, sets up title to a tract of land of thirty-six *arpents* front, on one side of the bayou Grand Caillou, in the parish of Terrebonne, by eighty in depth, and on the west side of eleven and a third *arpents* front, by the same depth, being a part of the tract of eighty *arpents* front, by eighty in depth, on both sides of the bayou, originally granted to Charles Jumonville De Villiers. He purchased from one Hutchins, who had previously purchased of Cocke, and it is admitted that there is a regular chain of conveyances from the grantee Jumonville De Villiers to the present defendant.

The record contains the copy of the original inchoate title of Jumonville, for a tract of eighty *arpents* front, by eighty in depth, on both sides of the bayou Grand Caillou, bounded below by the *ancien campement de Darbonne*, and a survey by Pothier, in 1804. This title is shown to have been confirmed and located by the United States; and the township plats, and other evidence in the record show, that it covers the land in controversy. The lower boundary of the Jumonville tract, as shown by the survey

by Pothier, is from eight to ten leagues from the gulf of Mexico, and as it has been located by the surveying department of the United States, it is proved to be distant twenty-eight miles. The two surveys correspond as to the point of beginning.

It is, therefore, quite clear, that the defendant has shown title in himself, derived from the Spanish government, and confirmed and located by the United States, to the land claimed and occupied by him.

On the other hand, the sale from Robert Brazil to the plaintiffs' ancestor, is an act under private signature, never recorded until 1842, for forty *arpents* front on each side of the bayou Cailou, bounded below by the land of Guillamme Darbonne, and above by public lands. The plaintiffs neither show any primitive title out of the domain in favor of Brazil, nor do they connect his title with that of Jumonville De Villiers. They rest their hope of recovering in this action upon the prescription of ten or twenty years, as alleged in their supplemental petition.

In order to succeed in making out a title by prescription, when out of possession themselves—such a title as would authorize their recovery as plaintiffs in a petitory action, the plaintiffs must, at least, show clearly, that before the possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession a sufficient length of time, under a just title, with proof of the exact commencement of that possession. Civil Code, arts. 3452 and 3453. We say *at least*, because in general the prescription *acquiritendi causa* avails only the possessor as an exception, and a bar to a petitory action instituted by the true owner, thereby giving effect to a title *a non domino*, accompanied by long possession, in good faith. But such a title would be sufficient to evict a possessor without an anterior title, yet all the above qualities of the previous possession must concur. Such an action was known to the Roman law under the name of *actio publiciana*. It was allowed in favor of one, who, having possessed in good faith and in virtue of a just title, had lost possession before his prescription was fully acquired; and might be maintained against one either without title, or at least one less valid and apparent. Duranton gives an example of this kind

of action. "Paul m'a vendu et livré un fonds dont il n'était pas propriétaire, et que je croyais lui appartenir : avant d'en avoir prescrit la propriété, j'en ai perdu la possession par une cause quelconque : un tiers s'en est emparé *sans titre*, ou parce que ce même immenble lui a été vendu et livré par Paul depuis l'achat fait par moi. Je ne suis pas, il est vrai, propriétaire, puisque Paul qui me l'a vendu et livré, ne l'était pas lui même, et que je n'ai point encore prescrit : or, en principe, il faut être propriétaire, et prouver qu'on l'est, pour pouvoir exercer la revendication avec succès. Néanmoins je dois être préféré, et je puis agir par revendication, comme si j'avais prescrit ; ce qui me serait surtout fort utile si je ne pouvais recouvrer la possession, soit parceque j'aurais succombé au possessoire, soit parce que j'aurais laissé écouler le délai utile pour agir par cette voie." 4 vol. No. 233. 1 Zacharie, Droit Français, p. 470.

The same doctrine is laid down by Pothier, in his Treatise De Droit de Propriété, Nos. 292, 293, and was alluded to and considered in *Bedford v. Urquhart* 8 La. 244.

Even this equitable action required all the qualities of good faith, just title, and open, public, and quiet possession, which would be necessary to repel an action against such possessor, instituted by the true owner, if he had not lost his possession.

But the present action is not exactly of that character. On the contrary, the plaintiffs contend that when they lost their possession, they had already acquired a better title than the defendants, by prescription. What are the facts in reference to possession? No possession by Brazil is shown, and none by the plaintiffs, until 1807 or 1808, although the sale by Brazil to their ancestor, purports to bear date in 1806. That possession was of a very insignificant part of the whole tract, without any survey, and without even recording in the parish in which the land lies the act of sale. Such a possession cannot be said to be unequivocal. In the case of *Gravier et al. v. Baron et al.*, the court said that, under the act of 1810,* a contract of sale not

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recorded is, in relation to third persons, considered as void. 4 La. 241. The act of 1810 requires even notarial acts to be recorded in the parish where the land is situated; and this law was held not to be repealed by the Civil Code, in *Carraby v. Desmarre*, 7 Mart. N. S. 661.

Thus it appears that the time at which the possession began is left vague; that the taking of possession was accompanied by no act showing that it was taken as owner, with pretensions to a large extent of land beyond the spot actually occupied, such as running out the lines by a surveyor, or recording their evidence of title for the information of the public. The plaintiffs, with a possession thus limited and equivocal, do not appear to have made any opposition to the location of the Jumonville title so as to embrace their improvement, much less to have obtained from the government any recognition of their title under Brazil. If such a possession be not, strictly speaking, clandestine, it is not, to say the least of it, such as to put the true owner on his guard; especially as it is wholly unconnected with any previous possession by Brazil, the plaintiff's vendor, who, for aught that appears, never had any title or possession at all.

As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the deed, such as proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness. But proof by a subscribing witness that it was signed and executed on the day it bears date, does not suffice, in our opinion, to give it effect from its date as to third persons. Parol evidence was, therefore, admissible only to prove the date of the act as between the parties thereto; but the rejection of it, as shown by the bill of exceptions, could not have any influence on the decision of this cause.

The testimony of Butler was objected to on the score of interest, holding himself a large tract of land under the title of Jumonville. This shows rather an interest in *the question*, than in the cause, and the objection goes to his credit and not to his competency; and the court did not err in admitting his testimony.

It appears from another bill of exceptions that the plaintiffs offered to prove by witnesses, that when Hutchins took posses-

sion, in 1829, he was notified of the title of the plaintiffs, and that he asked permission to remain there for one or two years and make a crop, and promised that all the improvements he would make should be for the benefit of the plaintiffs, and that he would never take advantage of his possession. This evidence was objected to on the ground, that the question of possession had already been definitely settled between the parties. We are of opinion that the court did not err. Such evidence could have no influence in a question of title, and the right of possession had been already decided.

Upon the whole, we are of opinion that the plaintiffs have failed to make out a better title than that of the defendant.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed; and it is further adjudged and decreed, that the defendant be quieted in his title to the tract of land described in his answer, against the pretensions of the plaintiffs, and that the appellees pay the costs in both courts. *

**Bodin*, for a re-hearing. The plaintiffs claim as owners, although the derivation of their title is *a non domino*, for they claim in virtue of that mode of acquiring which the interest of society at large has caused to be preferred to all other modes, and which the law causes to triumph over the true owner of the thing.

But is it only when the true owner attacks the possessor, that prescription may be opposed to him? Or, will prescription, *once acquired*, be always a victorious means of attack as well as of defence?

Our Code (article 3420) says, "that prescription is a means of acquiring." Article 3422 teaches, that "prescription, by which debts are released, is a peremptory and perpetual bar to every species of action, real or personal;" while, on the contrary, article 3421 declares, "that prescription by which property is acquired, is a *right* by which a mere possessor acquires the property of a thing."

Then the question presents itself, shall that acquisition be valid and available only during possession? If so, the provisions of the Code which immediately follow would be made to mean, that the possessor, after ten and twenty years, shall be able to repel the action of the true owner, and not that the thing is acquired after ten and twenty years. Article 3442 would be made to mean, that he who has a title to an immovable shall prescribe the possession, and not the property of it against the true owner.

Again, article 3444 would not provide, "that the property in slaves is acquired by five years." Thus the whole text of our laws on prescription conveys the idea of an acquisition, not of a mere means of defence.

If the property be once acquired, and the right to it exists by virtue of the law, no title deed can prevail against it. The law alone must declare in what man-

ner shall be destroyed the right which it has established. And as that right, when once acquired, is stronger than the claims of the true owner, he will stand in no better condition than any other person, if the thing acquired by prescription should be in his possession.

Such is the doctrine of Justinian, adopted by Pothier, and by all the authors who have treated of the matter. It is not the *actio publiciana*, but the action in revendication of the property, of which prescription has made him the owner, even against the former true owner, though armed with the true title.

The *actio publiciana* was resorted to only in the cases where the possessor, whose prescription (usucapion) was only commenced, claimed the possession against an usurper who had no title. Duranton speaks of it incidentally, as well as Pothier, in treating of the rights of property. The position of the parties in this case does not require the consideration of the principles which govern that action, a pure fiction in the Roman law, tending to operate the very reverse of the civil effects of *usucapion*. Ducaurroy, Inst. vol. 2, p. 315.

The question being then decided according to the doctrine of Justinian, there remains to be examined the character of the title upon which was based the prescription of ten and twenty years, pleaded by the plaintiffs. And this leads us to the consideration of the second motive for which we think it our duty to solicit a revision of the judgment.

The validity of the act *sous seing privé*, presented as the origin of the plaintiffs' title, was examined only collaterally in the discussion of the qualities of our possession.

Why should the two elements of our right of action be weighed together? Should the weakness of one prejudice the other, and the conditions wanting in the last be visited on the first? It is clear that if the two questions are kept distinct, the court will be liable to fall into one of those errors to which it is exposed by the viciousness of the system by which questions of fact, as well as of law, are to be decided by the same judge.

In considering the conditions of the plaintiffs' possession of twenty years, the court throw into the balance the supposed irregularities of their act of sale. It is thus that it declares the character of their possession to be *equivocal*, because that possession comprehended but a small portion of the land, without any survey, and without the recording of their title in the office of the parish judge, conformably with the act of 1810.

"That possession," says the court, "was of a very insignificant part of the whole tract, without any survey, and without even recording in the parish in which the land lies the act of sale. Such a possession cannot be said to be unequivocal. In the case of *Gravier et al. v. Baron et al.*, the court said that, under the act of 1810, a contract of sale not recorded is, in relation to third persons, considered as void. 4 La. 241. The act of 1810 requires even notarial acts to be recorded," &c.

Is it not evident that if the court had first examined the act of sale, and found it sufficient to prescribe under the prescription of ten and twenty years, it would not have reduced the extent of the possession, because then it would have been fixed by the title (Civil Code, art. 3464); and would not have destroyed its char-

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acter by requiring its registry with the parish judge, whilst its date is anterior to any law requiring the record of titles ?

A direct examination of the title would have led the court to a very different result, as to its value. The provisions of the law of 1810, which require the recording of acts, and even those of the Code of 1808, respecting acts under private signature, are posterior to the sale from Brazil to Prevost, and cannot have any retroactive effect. The law of 1810 disposes only for the future, as well as the law of 1827 creating the office of Register of Conveyances for New Orleans, and no one has ever had the idea of causing to be registered in that office, acts passed before 1827.

But it will be said, the date of the act of sale is itself uncertain, because the testimony of one witness does not suffice to establish its date with regard to third persons.

If the act of sale be examined apart from all consideration of the other facts of the case, it will be perceived that even admitting the principle (perhaps a forced one) that the testimony of a single witness to an act *sous seing privé* cannot give it a date with regard to third persons, there were proofs *dehors* the instrument itself which could establish its date with precision ; such as the fact that one of the witnesses was dead, and that the time of his death may be ascertained. If the court should think the proof of this fact necessary for the plaintiffs, as it is evident that they will be able to establish it, why not remand the case to the inferior court, or enter a judgment of non-suit against them ? Is not this the rule which law and equity calls for, and which has always been applied in similar cases ?

But another circumstance that strongly supports this act is, that it was passed before Louis De Blanc, a justice of the peace.

No doubt this magistrate had not the official capacity to give to the act an authentic character ; but the fact that he has signed it, being a justice of the peace, furnishes an extrinsic proof of its date, for, upon referring to the archives of the State, we find that Mr. De Blanc ceased to be a justice of the peace, in September, 1806 ; and the act is dated, May, 1806. This circumstance is *dehors* the act itself, and establishes that the act of sale was anterior to September, 1806.

The proof of the official character of Mr. De Blanc, and of the time during which he held his commission, need not appear in the record. The court may take cognizance of it, as was decided in 3 La., p. 436.

The moment that the date of the plaintiffs' title shall be established, it will be entitled to full faith and credit. It recites that the Prevosts were already in possession at the date at which it was passed. Other testimony corroborates this fact.

The plaintiffs' title being acknowledged as a sufficient basis to prescribe under, (for the court seem disposed to admit the doctrine of Toullier, vol. 8, No. 239, and of Pothier, in his treatise on Prescription, No. 99, and to concede that an act under private signature can serve as the basis of the prescription of ten and twenty years,) they are dispensed from proving ownership in their authors, and of showing a regular chain of title from the first and true owner of the thing. For,

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as says Ducaurroy, *loco citato*, the *usucapion* dispenses with all these proofs, because it confers on the possessor a right independently of that which his predecessors may, or may not have had.

"If such possession be not clandestine," (says the court, after having shown that the plaintiffs' act had not been registered,) "it is not, to say the least of it, such as to put the true owner on his guard; especially as it is wholly unconnected with any previous possession by Brazil, the plaintiffs' vendor, who, for aught that appears, never had any title or possession at all."

The plaintiffs cannot be reproached for not having shown a title from their author, for they indirectly admit that their title is *a non domino*, but allege that it is sufficient under the prescription of twenty years.

The plaintiffs are entitled, at least, to the small portion of land actually occupied by them for more than thirty years, and of which they have not been deprived by the possessory action. The judgment has not noticed that part of their claim, and the decree seems to bear on the whole tract.

Re-hearing refused.

ASA FOLSOM COCHRANE and others v. THE BANK OF THE UNITED STATES.

Where, after a seizure under a *fi. fa.*, the sheriff is enjoined from further proceedings, he should not return the writ into court, but retain it to be proceeded with in case the restraining order be withdrawn or annulled. Where a seizure has been made under a *fi. fa.* before the return day, the sheriff should retain the writ until the property is sold, or he is ordered by the plaintiff, or other competent authority, to release it. Where the seizure has been made before the return day, he may do all that the law requires of him, after that time.

Where, after a seizure under a *fi. fa.*, the sheriff, on being enjoined from further proceedings, returns the writ into court, and under an *alias fi. fa.* proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled.

APPEAL by the defendants from a judgment of the City Court of Lafayette, Carrigan, J., homologating the sale of certain property of the defendants sold under writs of *alias fi. fa.* issued from that court.

GARLAND, J. Upon six notes of the Bank of the United States, of \$100 each, protested for non payment in Philadelphia, at the instance of one Asa D. Gove, on the 23d of September, 1842, six different suits, in the names of Cochrane and five other persons purporting to reside in Boston, Cincinnati and elsewhere,

were commenced in the City Court of Lafayette, on the 5th of October, 1842. On the same day, at the instance of the counsel for the various plaintiffs, a young member of the bar residing in Lafayette, was appointed curator *ad hoc* to the bank; upon whom, on the same day, citations were served, and, on the next, answers were filed by him, without even having communicated the proceedings to the bank, or any of their agents. Upon the evidence of one Phelps, who was then clerk of the court, that the notes were genuine, six separate judgments were rendered for \$100, with interest and costs. The notices of judgment were served on the curator *ad hoc*, and, soon after, six executions were placed in the hands of the marshal of the court, which were levied on certain lots of ground in the city of Lafayette, and duly advertised for sale. Previous to the sale, the Commercial Court of New Orleans extended its jurisdiction into the parish of Jefferson, and issued an injunction, directing the marshal to desist from his proceedings. The parties were also brought before the Commercial Court by a rule, and, after hearing their counsel, it was ordered that the rule be made absolute, and that all further proceedings in the different suits be arrested, until the further order of the court. This order, the judge of the City Court refused to obey, alleging that the Commercial Court had no jurisdiction of the matter; and he ordered his marshal to proceed to advertise and sell the property seized in the aforesaid cases, upon the plaintiffs' giving a bond of indemnification. The seizures mentioned were made on the 21st of October, 1842, and the last order of the City Court given on the 26th of December, in the same year. No further proceedings seem to have taken place until the 5th of July, 1843, when six writs of *alias fieri facias* were issued. Under these, no seizure appears to have been made at all. There is a memorandum attached to them, relative to two lots of ground that had been previously seized, not signed by any one, which is descriptive of them. On the 17th of August, 1843, it appears that a sale was made by the marshal, under the executions, when Cochrane became the purchaser of two lots, and under an order of the court the marshal made a deed for them to him; where-

upon he applied to the court for a monition under the act of 1834.

The Bank of the United States made an opposition to its being homologated, because no demand of payment was made, or notice of seizure given : and on the grounds, that there was no legal advertisement or appraisal made ; that the legal delays had not been allowed between the time of seizure and sale ; and that the sale is informal and void, not having been made according to law. The restraining order of the Commercial Court is also alleged to have been violated, and that it is still in force. All the objections were overruled, the monition confirmed, and the defendants have appealed.

The judgment is erroneous on several grounds ; but it is only necessary to state one. Under the executions issued in October, 1842, the lots sold were seized ; when the Commercial Court granted its injunction, or restraining order, the marshall returned the executions into the clerk's office, with a statement of his proceedings up to that time. The summer following, after the judge and parties had determined to disregard the commands of the Commercial Court, six *alias* writs of execution were issued, no new seizure was made under any of them, nor is there any return on them of the proceedings of the marshall. It seems that the marshall advertised the property, and we find an appraisal in the record, but we see no seizure. The marshall could not have proceeded under the executions first issued, because he had returned them, and they were not in his possession. By returning those executions, and taking out new writs, all proceedings under the old writs were abandoned, and under the new executions new seizures should have been made. 1 Rob. 541.

The marshall was not bound to return those executions, when restrained by the Commercial Court. On the contrary, it was his duty to have endorsed on them his proceedings up to the time he was enjoined from further action, and to have kept the writs, to be proceeded on when the restraining order should be annulled or withdrawn. Whenever a sheriff or marshall has made a seizure under a *feri facias* before the return day, he must keep the writ under which he has acted until he shall sell

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the property seized, or is ordered by the party, or some competent authority, to release it. It is the warrant for his action, and he can do all the law requires of him after the return day as well as before, provided a seizure has been made before that day.

It is, therefore, ordered and decreed, that the judgment appealed from be annulled and reversed, and that the sale made by the marshall of the City Court of Lafayette, under the executions in favor of Asa F. Cochrane and others, against the Bank of the United States, on the 17th of August, 1843, be annulled and set aside, and the prayer for the homologation of the motion rejected, at the costs of the appellee.

T. Slidell, for the appellants.

Greiner and Durell, contrâ.

JAMES BEALE and others, Heirs of Thomas Beale, deceased, v.
DANIEL TREADWELL WALDEN.

The purchaser at a judicial sale, made under the orders of a Court of Probates, is not bound to look beyond the decree of the court recognizing the necessity of the sale.

He is bound to look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction, cannot be disputed.

The provision of the Code of 1808 (book 3, title 1, art. 59), that the place where the party died is that in which his succession shall be considered to be opened, having been repealed by the Code of 1825, which declares (art. 929) that the succession shall be considered as opened in the parish in which the deceased resided, if he had a fixed domicile within the State: *Held*, that the death of the party must be considered as irrevocably vesting the jurisdiction, and that, if the death occurred while the old law was yet in force, the jurisdiction must be determined by it, though no proceedings were had before the promulgation of the new. But that where a parish has been divided since the death, the jurisdiction will depend upon the fact of the court of the original parish having taken any steps, or assumed jurisdiction in relation to the *mortuaria*, before the division. If it has, its jurisdiction will not be divested by the division; otherwise jurisdiction will belong, under art. 929 of the Civil Code, to the court of the parish which embraces the residence of the deceased.

A tutor, as such, without letters of administration, has no authority to administer a succession in which his pupil has an eventual or residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors,

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as well as of the beneficiary heirs entitled to the residue after the payment of debts.

In the alienation of the property of minors, the advice of a family meeting forms an essential part of the judgment or *basis* upon which it rests. Though the Civil Code does not expressly require that the family meeting shall be held in the parish in which the court sits, such must be considered as the true construction of all its provisions, taken together. C. C. 305, 308. Act 10 March, 1834, s. 1

The act of 10th March, 1834, relative to the titles of purchasers at judicial sales, applied only to the actual and immediate purchaser at the judicial sale. The benefits of that act were extended to subsequent vendees, holding under the original purchaser at the judicial sale, by the act of 11th March, 1837. Consequently the homologation of the sale, on a motion sued out before the act of 1837, by one to whom an act of sale was executed, on an acknowledgment, at the foot of the *procès-verbal* of the auctioneer, made by the person to whom the property was adjudicated, that he had purchased the property for the former, will not cure any irregularities in the sale.

APPEAL from the District Court of the First District, *Buchanan, J.*

Lockett, Micou, Wilde and Roselius, for the appellants.

C. M. Conrad, F. B. Conrad, and D. Seghers, for the defendant.

W. Christy, made a party as assignee of the defendant, who had been declared a bankrupt since the commencement of the suit, appeared on the same side.

BULLARD, J. The facts connected with this controversy appear to be, that Thomas Beale, the ancestor of the present plaintiffs, died in the parish of Orleans, in 1820, leaving them as his heirs at law, and a widow in community, Céleste Beale, their mother, who became their natural tutrix. In 1823, his natural son, Thomas Beale, Jr., died. He had acquired by purchase from his natural father a large amount of property, by what appeared afterwards a simulated sale. While the estate of Thomas Beale, Jr., was in train of administration in the Court of Probates for the parish of Orleans, proceedings were instituted in that court by Céleste Beale, as widow in community and tutrix of her minor children, to annul that sale as simulated, and to subject the property, which formed the object of it, to the claims of the widow, minor heirs, and creditors of the father. The tract of land which is sued for in this case, was one of the objects sold. The incidents and result of that controversy may

be seen by the report of the case, in 6 Mart. N. S. 640, *Beale v. Delancy et al.* The judgment of the Court of Probates, which was affirmed in the Supreme Court, annulled the sale as simulated and void; and the court further decreed, "that all the moneys, titles, and effects constituting the estate of Thomas Beale, Jr., as well as the respective properties, so apparently sold, either *in rem*, if existing yet as such, or in value and proceeds, if disposed of legally, shall be, until further order, considered as *sequestered* and holden as such, and respectively for such parts thereof in their hands, by the curator of Thomas Beale, Jr., and the register of this court, to be afterwards disposed of and respectively delivered, to wit: the estate of Thomas Beale, Jr., for exclusive settlement and liquidation of direct and personal claims against it, to his mother, Mrs. Chlory Delancy, pursuant to the judgment in her favor, and upon fulfilling the requisites of the law; and to Mrs. Céleste Grandpré, widow of Thomas Beale, senior, or to any other appearing *regularly* and *legally* in court to the purpose, and to be so taken possession of, *in rem*, or otherwise as aforesaid, the properties namely, called in the aforesaid simulated acts of sale and mortgage, a plantation, slaves, and the Planters' and Merchants' Hotel, applicable whenever duly, separately and legally prayed for and acted upon, to both the settlement and liquidation of the estate of Thomas Beale, senior, which estate shall pay the costs of the present suit, and remain subject to any further eventual claims, or damages, resulting in law from the said simulated deeds of sale, either before or after this date."

This judgment, we have remarked, was affirmed in this court. These proceedings were had before the separation of the parish of Jefferson, in which the land is situated, and the minors resided with their mother, from that of Orleans. The parish of Jefferson was organized in February, 1825, but the act contains no provisions in relation to a transfer of causes pending in the courts of the parish of Orleans to those of the new parish, nor relative to the administration or liquidation of successions already opened before the separation of the two parishes.

It does not appear that the decree of the Court of Probates

for the Parish of Orleans, sequestering the property until further order of the court, was ever set aside. In the mean time, suit was brought in the District Court of the United States by Wistar against the widow and minor heirs of Thomas Beale, for a debt due by the deceased, and judgment rendered in May, 1829. This judgment appears to have been satisfied in July, 1830.

No administrator was appointed to the estate of Thomas Beale, senior, but in April, 1829, the widow appeared in the Probate Court for the parish of Jefferson, and was qualified as curatrix *ad bona* of one of her children, and tutrix of the others; and L. Favrot was appointed curator *ad lites*, and under tutor.

In May, 1830, the widow was authorized, by the Probate Court of Jefferson, on the advice of a family meeting convened in that parish, to borrow \$7,000, to pay the judgment rendered in favor of Wistar.

We now come to the steps which immediately preceded the alienation of the plantation, the validity of which is the principal question in this case.

The widow having caused an inventory of the property belonging to the succession of Thomas Beale, Jr., to be taken by order of the Court of Probates for the parish of Jefferson, presented her petition in July, 1830, in which she represents that she had effected the loan necessary to pay off the judgment in favor of Wistar; that, in order to secure the loan, as well as to pay the other charges of the succession, and to come to a final settlement of the estate of the deceased, and of his community with her, it had become necessary to proceed to the sale of the property belonging to the same. She prays that a certain part of the property, consisting of servants, furniture, &c., necessary for the use of the family, may be adjudged to her at the price of appraisement, and that the remainder may be sold, on such terms as a family meeting might direct; and for that purpose she prays for a family meeting. Whereupon a family meeting was ordered to take place on the same day, and accordingly it was holden before the judge himself. The family meeting advised the sale of the plantation, on a credit of one, two, three, and four years. These proceedings were homologated by the judge, and the sale ordered. But the plantation was not sold

for want of bidders; whereupon another family meeting was holden, which advised another appraisement. This meeting, and another afterwards, were convened in the parish of Jefferson. But the land still remaining unsold, another family meeting was ordered to convene in the city of New Orleans, before Seghers, a notary public, and on their advice as to the terms of the sale, the judge ordered the sale to take place at the Exchange Coffee House, in New Orleans.

It was in pursuance of this judgment that the plantation was sold, and adjudicated to E. Soniat, according to the certificate of the auctioneer.

At the foot of the *procès-verbal* of the auctioneer is an acknowledgment, signed by Soniat and Walden, that Soniat purchased the property for Walden. This acknowledgment is without date; but some days afterwards a notarial act of sale was passed to Walden, and signed by the widow, and by one of the heirs who had been emancipated in the mean time by marriage, and whose husband, Samuel Ricker, signed with her. This deed bears date the 19th of March, 1831, the adjudication having taken place on the 7th: and the parol evidence shows that the acknowledgment above mentioned was not signed until the 19th.

In November, 1834, this sale was homologated, on a monition sued out by Walden, in virtue of the act of 1834, "for the further assurance of titles to purchasers at judicial sales." The act extending the provisions of that statute to others than actual and immediate purchasers at judicial sales, was not approved until 1837. See B. & C.'s Digest, p. 586.

The defence to this action, as set forth in the defendant's answer and exception is, that the defendant is in possession, and is the owner under a valid and sufficient title; that on the 7th of March, 1831, the property was legally sold and adjudicated to the defendant, and a conveyance signed on the 19th of the same month; that the sale as afterwards homologated on monition; that the sale was necessary to pay certain pressing debts; and that the price paid was applied to pay those debts. He claims to be paid for improvements of the value of \$20,000, and to be refunded, in case of eviction, one half of the price paid by him; and, finally, he pleads prescription.

The case was tried by a jury, who, under the instructions of the judge, found a verdict for the defendant ; and, judgment having been rendered accordingly, the plaintiffs appealed.

The counsel for the appellants contend in this court : 1st. That the Court of Probates for the parish of Jefferson had no jurisdiction, and that the natural tutrix had no lawful authority to sell, without having first obtained administration and given security. 2d. That the sale did not pursue the adjudication, and that the transfer from Soniat to Walden was not a judicial sale. 3d. That there is no legal evidence of a debt due to Wistar by the heirs of Beale, and that the proceeds of the sale are shown not to have come to their hands, or been applied for their benefit. 4th. That neither the prescription of five nor ten years can avail the defendant.

The whole controversy turns upon the two first questions here presented, to wit, the jurisdiction of the Court of Probates of the parish of Jefferson, and, if it had such jurisdiction, whether Walden was a purchaser, at a judicial sale ; for if that court had jurisdiction, we will not go behind its judgment to enquire whether there was legal evidence of a debt, or, in other words, a necessity for the sale, or whether the proceeds went into the hands of the tutrix for the benefit of the minors ; and if Walden was not a judicial purchaser the defects in the proceedings are not cured by a monition and homologation of the sale, before the passage of the act of 1837, extending the benefit of the act of 1834 to subsequent vendees, holding under the original purchasers at judicial sales. In *Michel's Heirs v. Michel's Curator et al.* (11 La. 134), we held that the purchaser is not bound to look beyond the decree of the Court of Probates recognising the necessity of a sale ; and in *Lalanne's Heirs v. Moreau*, the court said, that the purchaser under a decree of the Court of Probates is bound to look to the jurisdiction, but that the truth of the record concerning matters within that jurisdiction cannot be disputed. 13 La. 432. 3 Rob. 120.

First, then, as to the jurisdiction of the Court of Probates of the parish of Jefferson.

The succession of Thomas Beale, senior, was opened in a legal sense by his death, which took place in the parish of Or-

leans before its division. If the Court of Probates had already taken cognizance, before the parish of Jefferson was set off, its jurisdiction was not divested by the separation. This point was expressly decided in *Putouillet v. Putouillet* (2 La. 270). In the case of *Forstall v. Forstall et al.* (4 La. 214), in which the question arose, whether the Probate Court for the parish of Orleans, in which the succession was opened under the old Code, but where no proceedings were had before the amendments of the Code which adopted a different rule, or the court in which the succession was opened under the new Code, had jurisdiction, this court held that the Court of Probates did not lose its jurisdiction, although no proceedings were had until after the promulgation of the new Code, which repealed that provision of the old. In *Harang v. Harang et al.* the court held, that when a parish is divided, the court of the parish composed of that in which the deceased resided before his death, will have jurisdiction of the settlement of his estate. 7 Mart. N. S. 51.

The principle clearly deducible from these different decisions is, that where there has been a change of legislation as to the parish in which the succession shall be considered as opened by the death of the party, his death will be regarded as irrevocably vesting the jurisdiction, but that where a parish has been divided afterwards, then it will depend upon the fact, whether the court of the original parish had taken any steps, or assumed jurisdiction in relation to the *mortuaria*—if so, its jurisdiction is not divested by the change, otherwise it will belong to that of the two parishes which embraced the residence of the deceased.

The position of the two successions of Thomas Beale, senior, and of Thomas Beale, junior, as shown by the record in the case of *Delancy et al. v. Beale*, is quite anomalous. They were blended together as to claims against them, in consequence of a simulated sale from the father to the son, which appears to have been a sale *omnium bonorum*. There was administration of the son's estate, and the property thus acquired, for which the son's estate still owed about \$124,000, was sold and bought in by the widow of Thomas Beale, senior, who claims to be set down for herself and her minor children, as mortgage creditors for that

amount. Upon this opposition the decree was made by the Court of Probates of the parish of Orleans above set forth, annulling the simulated sale, and sequestering the whole in the hands of the curator and the register of the court, with a view to a separate administration according to law. That this is evidently the view of the court, is apparent from another part of the decree, not copied above, which is as follows: "And it is finally ordered and decreed that, owing to the confusion of the claims and oppositions cumulating against one estate, the settlement and liquidation of two, which are imperiously and lawfully to be made separately, all other creditors, in their respective applications, shall stand before the court in *statu quo*, or nonsuit, until by *regular respective* proceedings for further administering upon the two separate estates, agreeably to the judgment of the court, and that they may be accordingly classed in proper *new tableaux* of distribution, according to their rank and privilege, &c."

Thus it appears that the property composing the estate of Thomas Beale, senior, or at least the bulk of it, and particularly the property now in controversy, was sequestered and held in the custody of the law, by the same judgment which restored the property to the estate, with a view to its regular separate administration. No such administration ever took place, either under the authority of the Court of Probates of New Orleans, or that of the parish of Jefferson; nor does it appear that the order of sequestration was ever set aside or rescinded. On the contrary, it appears by a document in the record, that certain creditors, the register of the court, and the attorney of the natural mother of Beale, junior, who was his heir under benefit of inventory, had agreed with the widow of Beale, senior, not to molest her in proceeding to have all the property sold, upon the express condition that D. Seghers should keep in his hands, or under his control, a sufficient amount of the proceeds of said sales, to answer for certain claims. It was in pursuance of this agreement that the widow, acting as tutrix of her minor children, provoked the sale of the property, without having been appointed administratrix of the estate. These proceedings, in our opinion, amount to an assumption of jurisdiction by the Court of Probates

of New Orleans—such a commencement as conferred on the court the exclusive power to continue the administration under its control.

But if this were doubtful, it has been repeatedly decided by this court, that a tutor, as such, without letters of administration, has no authority to administer on a succession in which his pupil has an eventual and residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors, as well as the beneficiary heirs entitled to the residue after the payment of debts. *Jacob, Tutrix, v. Tricou et al.* 17 La. 104. *Tildon v. Dees, Tutrix*, 1 Rob. 407.

Not only was the tutrix without authority to provoke the sale, but, in our opinion, the proceedings which led to it were irregular. In matters of alienation of minors' property, the advice of a family meeting forms an essential part of the judgment, or basis upon which it rests. It is true, the Code does not expressly require that the family meeting should be holden in the parish where the court sits. But such must be regarded as the true construction of the Code, when all its provisions on this subject are considered together. The 305th article of the Code requires that the family meeting shall be selected from those residing in the parish in which the family meeting is held, that is, the domicile of the minors. Now, if the judge could appoint the meeting to be held in a parish in which the minors do not reside, he might order it in a parish remote from the residence of all their nearest relations. Again, the members are to be convoked by *citations* addressed to them; and it can hardly be supposed the legislature intended to authorize the Court of Probates to send its process beyond the limits of the parish. The act of 10th March, 1834, passed subsequently, it is true, to the proceedings in this case, yet contains a legislative construction of the previous laws, which confirms these views. It authorizes the judge to impose a fine not exceeding twenty dollars for neglecting to attend a family meeting, to be collected in the same manner as fines imposed on witnesses failing to attend. The court could not fine a person beyond the reach of its process, nor send an officer to collect the fine. B. & C.'s Dig. 437. We think, therefore, the Code contemplated that the family meeting should be holden in the parish where the minors reside, and within the

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jurisdiction of the court by which it is ordered, although by an amendment of the Code in 1826, relations residing within thirty miles, may be required to attend, without regard to parish lines. B. & C.'s Dig. p. 151, s. 18.

This irregularity would, perhaps, be cured by the homologation of the sale under monition, but we have already said that, in our opinion, Soniat was the purchaser at the judicial sale, according to the *procès-verbal* of the auctioneer, and the name of Walden was substituted afterwards, in consequence of doubts having arisen in the mind of Soniat as to the regularity of the proceedings and the validity of the title thus acquired. The sale was complete between the parties by the adjudication; and Walden was informed, according to the evidence, of the difficulties which existed as to the title.

It is not shown that any part of the price for which the property was sold has been received by any of the plaintiffs since they attained the age of majority, so as to amount to a tacit ratification. One of the notes given for the price, amounting to \$5,975, was discounted by the widow, and applied to pay the Wistar judgment. That judgment was against the plaintiffs, as heirs of Thomas Beale, and consequently that part of the price went to benefit them, and allowance ought to be made for it in compensation of rents and profits. The plaintiffs' mother, it appears, had paid the judgment, and afterwards discounted the note to reimburse herself. The amount borrowed by her to pay the judgment was \$7,350; but that was raised by a mortgage on community property, and was a community fund. As one half belonged to the minors, they were accountable only for the other half, \$3,675. The fruits, at the rate of \$1,000 per annum, for one undivided half of the land, say three years and five months, since this suit was instituted, equal to \$3,416 50, leaves a small balance in favor of the plaintiffs, of \$258 34, which they are entitled to recover, together with half the land. No improvements are shown to have been made, for which the defendant is entitled to any allowance; and the plea of prescription is not sustained by the evidence.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and ours is, that the plaintiffs recover one undivided half of the tract of land described in their

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petition, and be quieted in their title thereto; and that they further be allowed, as a claim against the estate of D. T. Walden in the hands of his assignee, to be paid in due course of administration, the sum of two hundred and fifty-eight dollars and thirty-four cents, with costs in both courts.

JOHN FLEMING v. LUCIEN G. HILIGSBURG and another.

The plaintiff in an action before a District Court assigned his claim therein to several creditors, notifying the defendants; other of his creditors, having obtained judgments against him, levied their executions, in the hands of the defendants, on his interest in the suit. Defendant having died pending the suit, his executors took a rule in the District Court on the assignees and seizing creditors to determine their respective ranks, and for the purpose of distributing among them the amount of the judgment which had been rendered in favor of the plaintiff, which they deposited with the clerk of the District Court: *Held*, that the amount so deposited is a debt in money due by the succession of the defendant to the assignees or seizing creditors; that the Probate Court, in which the succession of the defendant was opened, has exclusive jurisdiction to determine their rights and privileges on the sums due by the estate of the deceased (C. P. 924 §13, 983); and that the assignees or seizing creditors, though they may have submitted below to the jurisdiction of the District Court, may demand, on appeal, the nullity of the judgment of the latter, on the ground of a want of jurisdiction. C. P. 606 §3, 608. The consent of parties cannot give jurisdiction, when wanting *ratione materiae*. It can only confer it, where mere personal rights are involved; or where a defendant is sued before another judge than the one of his domicile, and he nevertheless pleads to the merits. C. P. 93.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J.* This case, which was a claim on a building contract, and for extra work, was before us in July of last year, upon an appeal taken by the defendants, and the judgment of the lower court was amended so as to reduce the plaintiff's demand to \$1,818 40. Pending the appeal, Hiligsberg died in the parish of St. Bernard, and his estate fell under the administration of three testamentary executors, Louis Pilié, Joseph Pilié, and Léon Bernard. It appears that the plaintiff, who was largely indebted at the time of the institution of his suit, made

*MARTIN, J., being interested in the question, did not sit on the trial of this case.

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to several of his creditors assignments of his claims therein, and that these assignments were notified to the defendants. A number of creditors of Fleming, some of whom were laborers and material men, brought suit against him, and having obtained judgments, levied their executions, in the hands of the defendants, on all the right, title and interest of their debtor in said suit. Thus a conflict existed among these various claimants, each pretending to have a privilege or preference on the sum due by the estate of Hiligsberg, by reason of a seizure, or a transfer of the plaintiff's rights. The executors thought proper to take a rule in the District Court against all these parties, for the purpose of determining their respective ranks, and having a distribution made among them of the amount of the judgment in favor of Fleming, which they deposited with the clerk of that court. On a hearing of the rule, the judge below, after allowing some offsets, claimed by the defendants, ordered a *pro rata* distribution of the balance among the material men and laborers, conceiving that they had a privilege on the houses built by the plaintiff. J. A. Lacroix, one of the assignees of Fleming's claims against the defendants, moved to set aside the judgment, on the ground that the District Court was incompetent to try the issues presented by the rule, the Probate Court of St. Bernard having exclusive jurisdiction to establish the order of privileges, and mode of payment of the sums due by the estate of Hiligsberg. In case his motion should not be sustained, he moved for a new trial. Lacroix was joined by Lewis and Joseph Pilié, two of the executors. They alleged, in substance, that they were advised that the Court of Probates of the parish of St. Bernard, where the succession of Hiligsberg was opened, was the proper and only tribunal, having jurisdiction of the subject matter of the rule taken in the District Court; that the judgment rendered on the rule by the latter court would not operate as a legal release in favor of the executors for payments made under it, at least as to persons not parties to the proceedings; that by depositing money in the District Court, to be applied to the payment of Fleming, or his assigns, the executors had conferred upon them a priority they were not entitled to, as they should be paid only in due course of administration, and the ex-

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ecutors may have subjected themselves to the provisions of the law of the 13th of March, 1837; and that, if the parties to the rule were bound to join in the *concurso* before the tribunal where Hiligsberg's succession was open, it was not too late to remand the cause to said court. In case the motion to set aside the judgment or dismiss the rule did not prevail, these executors moved for a new trial. The motion of Lacroix having been overruled, and a new trial refused, he took the present appeal.

The appellant, and the two executors above named, have asked of this court to annul the judgment appealed from, for want of jurisdiction in the District Court; and they rely on articles 983 and 924 of the Code of Practice. The first provides that all debts in money which are due from successions administered by curators appointed by courts, and by testamentary executors, shall be liquidated, and their payment enforced by the Court of Probates of the place where the succession was opened. Article 924, sec. 13, declares, that the Courts of Probate have exclusive power to decide on claims for money which are brought against successions administered by curators, testamentary executors, or administrators, and to establish the order of privileges and mode of payment. The amount deposited by the executors in the District Court was a debt in money due from the succession of Hiligsberg to Fleming, or rather to those who acquired his rights by assignment, or seizure. The latter must be considered as the real creditors of the estate. Hiligsberg, from the moment the transfers were notified to him, or the seizures were levied in his hands, could not have safely or legally paid the debt to Fleming, whom he could no longer consider as his creditor. Had the rule not been taken, and had the amount of the judgment not been deposited with the clerk of the District Court, it is clear that the transferees and seizing creditors of Fleming would have been compelled to present their claims to the Probate Court of St. Bernard, which alone would have been competent to determine on their respective rights and privileges on the sum originally due by the estate to their common debtor, and to order its payment to them. If, for these purposes, the jurisdiction of the Court of Probates of St.

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Bernard is exclusive, it is equally clear that payments made under the order of the District Court would not avail the executors, and protect them against the claims of other assignees of Fleming, if there be any, not known at present. The decree of the District Court ordering the distribution of these funds of the estate of Hiligsberg, if not absolutely void, is clearly voidable, and its nullity is now demanded in this court. It is objected that the parties who claim here such nullity, having submitted to the jurisdiction of the inferior court, cannot now plead its want of jurisdiction. To this it is a sufficient answer to say, that consent of parties cannot give jurisdiction to a court, when it is wanting *ratione materiæ*; but can give it only when personal rights are involved. *Duvey et al. v. Griffin's Executors*, 1 Mart. N. S. 201. *Kerr v. Kerr*, 14 La. 178. The Code of Practice, besides, after providing (article 606, sec. 3) that the nullity of a judgment may be asked when it is rendered by a judge incompetent, either owing to the amount in dispute, or to the nature of the case, further provides (article 608) that such nullity may be demanded from the court which rendered the judgment, or from the court of appeal to which the case is taken. The nullity then may be demanded in this court by either of the parties to the suit, who must necessarily have at first submitted to the jurisdiction of the court below. Article 93 of the Code of Practice presents, perhaps, the only instance where the appearance of the party cures the want of jurisdiction. It is when a defendant is not sued before the judge of his domicile, and he nevertheless pleads to the merits. Our opinion on the question of jurisdiction renders unnecessary the examination of any of the other matters presented by the record.

It is, therefore, ordered, that the judgment of the District Court be avoided and annulled; and it is further ordered, that the rule taken on the 20th of July, 1844, be dismissed, with costs in both courts.

Delavigne, for the appellant.

Roselius, Bernard, Bodin, Pilié, Canon, Le Gardeur, Schmidt, Castera, Latour, Mace, Lombard, L. C. Duncan, W. S. Upton, A. Hennen, Preaux, and Bartlette, for the different appellees.

RICHARD M. KIRKBY and another v. ROBERT C. ARMISTEAD.

An agent is responsible for any damage that may result from his neglect of duty.
C. C. 2971, 2972.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Jones*, for the plaintiffs.

Van Matre, for the appellant.

SIMON, J. This case presents a mere question of fact, which was solved below in favor of the plaintiffs, who had judgment for the sum of \$200, and the defendant appealed.

It appears that in March, 1839, the defendant undertook to ship to Liverpool, by way of New York, to the address of one of the plaintiffs, a small quantity of silver plate, said in the petition to be of the value of \$300. The plate was the property of the plaintiffs, they having inherited the same from their father, and was delivered by their agent to the defendant for the purpose aforesaid, contained in a small trunk, ten dollars being also paid to him to defray the expenses. In the beginning of 1840, the defendant having been asked by the plaintiffs' agent, if he had shipped the plate, answered *affirmatively*, but said *he had not yet received advice of its arrival at New York*. Several months afterwards, as the agent had received accounts from England that the plate had not arrived there, he wrote to the defendant for information on the subject, who answered, on the 16th September, 1840, that it was burnt during the fire which had entirely destroyed the building he then occupied, and that no trace of it was found among the few articles saved. Various estimations have been put upon the plate by the witnesses on both sides. The agent says that he supposed it to be worth from \$250 to \$300. One of the defendant's witnesses says, that he would not have given \$50 for the trunk and contents; and another proves that the defendant offered to pay one hundred dollars to compromise the matter. It is also admitted by the defendant, that vessels are continually sailing from New Orleans to New York. It is shown that said defendant is a merchant in this city; that there is no difficulty to be found in shipping goods to New York or Liverpool; and that there are always ships

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and packets leaving for the latter places, by which the smallest kind of package could be sent without any difficulty.

We think the defendant is responsible. He has not attempted to adduce any proof to show that he made any effort to comply with his obligation, which, from the moment that he undertook and promised to ship and forward the objects delivered to him to their destination, had become that of an agent, except that one of his witnesses says, that about a month after the trunk had been brought to his store, the defendant having gone to see to get it on board a ship, afterwards returned, and told witness that the ship would not take it. No account is given of the fire alluded to in his answer to the agent, any further than that the store of the defendant was burnt in the spring of 1840, at least a year after the plate was put in his possession, and that nothing was saved from the upper stories of his store, where the trunk had been deposited and kept. No witness, however, undertakes to swear that it was there at the time of the fire; and if it was, it is clear that the defendant had neglected for one year to perform the obligation which he had voluntarily contracted, and he must be bound by the consequences of his neglect. Civil Code, arts. 2971, 2972, 2973. 7 Mart. 464. 4 La. 28. 2 Rob. 103.

It does not appear to us that the value put upon the plate by the judgment appealed from, is excessive.

Judgment affirmed.

WILLIAM M. LAMBETH and another v. THE WESTERN MARINE AND
FIRE INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Moise* and *W. M. Randolph*, for the appellants.

Maybin, for the defendants.

GARLAND, J. The plaintiffs claim the sum of \$1,610, the value of ninety-two bales of cotton, which they say was consigned to to them as factors, belonging to Paup & Hicks, of Arkansas, and shipped from a landing on Red river, on the steamer Saline and covered by an open policy of insurance. The cotton was

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lost by the boat striking a snag, and sinking in a few minutes thereafter.*

The defendants admit the execution of the policy, but deny that any cotton was ever consigned to the plaintiffs by Paup & Hicks, which was covered by it. They allege and prove, that there is a clause in the policy which says, that "cotton is to be excepted from insurance, which shall be ordered not to be insured, of which the insurers are to be notified immediately on the receipt of such order; and the cotton of the parties thus excepted shall not afterwards be covered, without the consent of the insurers." They say that the cotton in question was intended to be consigned to Maddux, Pollard & Co. by Paup & Hicks; and that Paup & Hicks had given orders to Maddux, Pollard & Co., that said cotton was not to be insured, and directed them so to notify the insurers, which they did before the shipment; and that said cotton could not afterwards be covered by any policy of theirs, without their consent.

The facts, as we have elicited them from the letters of Paup, and the statement of the witnesses, which conflict in some points, are: That Paup and Paup & Hicks are cotton planters on Red river, and have been so since the year 1836 or 1837. Maddux, Pollard & Co. were their agents and factors in New Orleans. In 1839 these agents received the crops made in 1837 and 1838, and sold them. Paup was then in the city, and gave the agents orders not to insure the cotton of himself and partner in future, in the presence of the president of the company, of whom he at the same time inquired if he would insure against fire alone, and being answered affirmatively, he said he would give directions about that whenever he should make another shipment of cotton. In 1839, Maddux, Pollard & Co. took out an open policy from the defendants, to cover consignments of cotton to them for the next twelve months, not saying anything about the cotton of Paup & Hicks. In the spring of 1840, Paup consigned 61 bales of the crop made in 1839 to Maddux, Pollard & Co., and they, having forgotten the order given the year previous, said nothing to defendants about excepting it from the policy, paid

* The boat was lost on the 30th July, 1840.

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the premium, and charged him with it. On the 29th of May, 1840, Paup writes to his factors, and, among other things, says: "By the time I can get my cotton down, it will be sometime in July! I shall ship my cotton to you, as soon as I can get it off. When I was in New Orleans, I told you I should not insure my cotton again, and in the presence of Mr. Matthews made the same remark, and asked him if the office would insure against fire alone; he remarked that it would, at about half per cent. I then told you if I concluded to insure against fire, I would write you. I was surprised on receiving account of sales of my 61 bales, to find insurance charged. I presume you have not settled with the office yet; any how, you must rectify the matter. As far as I am concerned, I cannot think of paying it." When this letter was received, it was shown to Matthews, the president of the company, by Pollard; but he said that the company could not refund the premium then, as no exception had been made of Paup's cotton, or notice given of an intention not to insure it. Pollard then told the president to except the cotton of Paup and of Paup & Hicks from their policy, and as the premium was not refunded, and Paup would not pay it, Maddux, Pollard & Co. had to lose it. On the 18th June, 1840, Paup again writes: "In consequence of our river getting so low, I have not been able to send my cotton as expected; but as soon as the raft is removed, and the boats begin to run, you may expect it." He then goes on to order various supplies for a person, for whom it would appear he was agent; requests his factors to endeavor to procure \$5,000 in Arkansas money for him, and, in other respects, shows the greatest confidence in them. So far there is no contradiction or doubt as to the testimony; but as to what Paup's directions were about shipping the cotton, and as to what subsequently occurred, there are several discrepancies in the statements of the witnesses. We have examined their depositions and the circumstances under which they gave their testimony. All the witnesses in Arkansas were examined under commissions, and our opportunities of weighing their testimony are as good as those of the judge below. After a close examination of their statements, our views accord very nearly with those of the judge of the Commercial

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Court as to their weight and effect. We have no doubt, that it was the intention of Paup to have the cotton consigned to Mad-dux, Pollard & Co., and that such were his instructions to the captain of the *Saline*, although he says that he was directed to consign it in the bill of lading to the plaintiffs. That statement we think is erroneous; at any rate the weight of the testimony is against it. Lyons and Cermenati say otherwise. The captain, from the fact of his having misunderstood, neglected or disobeyed the instructions of Paup (as we have no doubt he did), had a strong bias, if not positive interest, in making out as strong a case as he could for the plaintiffs. There is something suspicious about the bill of lading also. Cermenati swears positively that it was not made out until after the cotton was lost. Cummings, the captain, and Marble, the clerk, swear that a bill of lading was made out whilst the cotton was being taken on board; but that no one being at the landing to receive it, they brought it down to Fulton. There, both say, an alteration was made, and a new bill given, as there was an error in the first, and the purpose was to correct it. The error, according to their statement, was, in stating in the bill that the cotton was marked J. W. Paup, when it should have been Paup & Hicks. If this be true, the attempt to correct the error was very unfortunate, for the bill of lading filed states the cotton as "marked J. W. Paup, New Orleans," and that it was shipped by him. We do not think the effort to impeach the evidence of Lyons, Cermenati, and Marsh, has been successful. It is further proved, that neither Paup, nor Hicks, ever had any correspondence or acquaintance with the plaintiffs previously to this time. Even after the loss, neither of them wrote a line to the plaintiffs; but either Paup, or the clerk of the boat, sent the bill of lading and the protest to them, without a word of instruction or explanation, which looks unusual. The court below gave a judgment for the defendants, and the plaintiffs have appealed.

We have no doubt that the policy of Lambeth & Thompson would cover all the cotton really intended by the owners to be consigned to them; and upon the principles stated in the case of *Ballard v. The Merchants' Insurance Company* (9 La. 258), it would probably do so, even if the cotton was sent to them

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through error, provided it was shown to have been the intention of the shipper or owner that it should be covered by some policy. But the reverse of that is proved conclusively in this case. In 1839, Paup told Matthews it was not his intention to insure for the future, except against fire. He so informed his agents, and when, from forgetfulness, they did insure, he disclaimed it, and compelled them to lose the premium; and we have no doubt that, if the cotton had arrived in safety, the owner of it would again have refused to pay the premium, on the ground that the defendants knew it was not his intention to insure at all. As it is lost he must bear the loss, and recollect that the contract of insurance is one based in principles of honesty and justice, and that neither party is permitted to take advantage of the other.

We think there is a marked difference between this case and that in 9 La. 258, relied on by the plaintiffs' counsel, and that the policy never attached. We do not question the right of the principal to change his agent, or of a planter to change his factor, whenever it is his interest or pleasure to do so; but it does not follow that by so doing, he can attach responsibilities to others without an equivalent, particularly when he had given notice of an intention not to have any thing to do with them. The policy is for the benefit of all those making a consignment, who really intend to avail themselves of it, and incur the premium; but those who evidently do not intend to do so, cannot avail themselves of the protection afforded.

Judgment affirmed.

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NATHANIEL MONTROSS and another v. GEORGE HILLMAN and another.

An exception that the petition contains contradictory allegations, and that plaintiffs cannot proceed without selecting the ground of their action, relates to the substance, not to the form of the action, and may be pleaded at any time before judgment. C. C. 344, 345.

A plaintiff may set forth in his petition different grounds upon which he expects to recover, provided he do not make demands one of which necessarily excludes the other. C. P. 149.

Where, in case of a judgment against defendants, one offered as a witness will be liable to the latter for the debt and costs, but, in case of a judgment in their favor, will be bound for the debt alone, he is incompetent. An interest in the costs renders a witness incompetent.

Where the evidence induces the belief that the goods, for the price of which defendants are sued, were sold on their credit, they will be bound therefor, though there be no proof of an express guarantee on their part.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Emerson*, for the plaintiffs. The exception related to matters of form, and was inadmissible. Code of Pract. art. 344. *Rawle v. Skipwith*, 8 Mart. N. S. 410. The witness, Hillman, being interested in the costs, was incompetent. *Lessassier v. Hertzel*, 8 Mart. N. S. 265. 3 Starkie on Evid. p. 752. Greenleaf on Evid. p. 435, and notes. The retaining of the drafts by the defendants must be treated as an acceptance. Bayley on Bills, ed. 1830, ch. 6, sec. 1, pp. 191—194, and authorities there cited. Story on Bills, 272.

Larue, for the appellants.

MORPHY, J. The defendants are sued for \$704, on the allegation that, at their special instance and request, the plaintiffs did sell and deliver to them certain goods and merchandise, for the house of Hillman & Drew, and for Hercules Hillman, at Lake Providence, in the parish of Carroll; and on the further allegation that the defendants, at the time of making these purchases, did represent the said Hillman & Drew, and Hercules Hillman to be good and solvent, and guaranteed the payment of the price of said goods to the plaintiffs, and that, on previous occasions, they had accepted and paid drafts drawn on them by said Hillman & Drew, and H. Hillman, for goods purchased by Hillman

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& Shea, under similar circumstances. The plaintiffs had a judgment below, from which the defendants have appealed.

During the trial, and after some testimony had been taken, the defendants tendered a peremptory exception to the petition, alleging that it contained contradictory matters, and that the plaintiffs could not proceed unless they selected the ground of their action. The judge refused leave to file this exception, on the ground that it came too late, and should have been pleaded *in limine litis*. We conceive that an exception of this kind, when well taken, relates not to form but to substance, and can be set up at any stage of the suit, before judgment; but we do not find cumulated in the plaintiffs' petition any inconsistent demands, within the sense and meaning of article 149 of the Code of Practice; nor do we think the counts or allegations in it absolutely inconsistent; but even if they were so, the petition contains but one demand, which is for the price of certain goods sold by the plaintiffs. Nothing prevents a party from setting forth different grounds upon which he expects to recover, provided he does not make two demands, one of which necessarily excludes the other. Code of Pract., arts. 149, 344, 345. 4 La. 360.

Our attention has been drawn to a bill of exceptions taken to the examination of Hercules Hillman as a witness, on the score of interest. Under the pleadings and evidence in the case, the defendants stood in the relation of a surety or guarantee to this witness. He was, in our opinion, incompetent to testify in the case, because he was interested in defeating the action. In the event of a judgment against the defendants, he would be liable over to them for the debt *and costs*, while he could pay the debt, *without costs*, if there was a judgment in their favor. An interest in the costs is sufficient to render a witness incompetent. 1 Phillipps on Evidence, p. 48. 3 Starkie, p. 752. 8 Mart. N. S. 265.

On the merits, the testimony of the plaintiffs' clerk shows, in substance, that the goods mentioned in the account sued on were ordered by the defendants, to whom they were sold for account of Hillman & Drew and Hercules Hillman; that, at the

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defendants' request, the goods were packed and shipped to the latter at Lake Providence, and that the items and prices set forth in the account are correct. George Hillman, one of the defendants, and the brother of Hercules Hillman, called at the plaintiffs' store, in November, 1841, and said he wanted to purchase goods for Hercules Hillman, and had brought two persons with him to select them. Nothing was said about the manner in which the goods were to be paid for, at the time they were ordered. Plaintiffs had previously sold goods to Hillman & Drew. The course of business between the parties, in 1840 and 1841, had been, for the plaintiffs to sell goods to Hillman & Drew, for which they gave their drafts on the defendants, who accepted and paid them. In the previous transactions, H. Hillman being here, had purchased himself, and given his drafts on the defendants. The witness charged the goods on the books to Hillman & Shea, for H. Hillman, and enclosed to the latter a draft for their amount, to be signed by him and sent back. H. Hillman wrote to the plaintiffs that among the goods sent to him, there were some which he would not be able to sell, and which he returned, enclosing at the same time a draft on the defendants for \$689 35, which draft was left with the defendants for acceptance. The plaintiffs sent the witness, their clerk, three times, to get the draft back, but it has never been returned. The last time he called on the drawees for the draft, the witness saw Shea, one of the defendants, who said that his partner, George Hillman, would bring it round. The witness adds, that the plaintiffs were not in terms directed by George Hillman to send up a draft on the defendants, to be signed by his brother, but that was what he understood was to be done from the former transactions between the parties. Wm. Stewart testifies, that he heard a conversation between Montross and George Hillman, in November, 1841, about some goods which were to be shipped to H. Hillman, at Lake Providence. Montross objected to the goods being sent, on account of some reports he had heard in New York about the firm of Hillman & Shea. These reports were in relation to some paper of the firm, which had been suffered to lie over in that city. We find in the record the letter written to the plaintiffs by H. Hillman, when he sent

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back a portion of the goods. He mentions that he will endeavor to send the money to Hillman & Shea by the earliest opportunity, and he encloses his draft on them, in favor of the plaintiffs, for the amount, within a few dollars, of the account sued on.

Although no proof has been adduced of an express guarantee on the part of the defendants, the evidence impresses us with the belief that the goods, the price of which is claimed, were sold on their credit. This appears to have been the understanding of all the parties, from the course of dealing previously existing between them. If a different course was intended by the defendants, when the last purchase was made, in November, 1841, they should have signified such intention. Their silence in that respect, when they ordered the goods, induced the belief on the part of the sellers, that the same mode of settlement would be followed as on former occasions. The goods were accordingly charged to them on the books, and a draft was sent up to be signed, as usual, by H. Hillman. Some of the goods having been returned as unfit for his market, he enclosed to the plaintiffs another draft of a smaller amount on the defendants, thus showing his understanding of the matter, and his expectation that they would pay; and, in his letter to the plaintiffs, he speaks of soon sending money, not to them, but to Hillman & Shea, on whom he had drawn. When this draft is presented to the defendants they do not make any objection or refuse to accept, but keep it in their possession, and after having been several times called upon, they finally answer that it will soon be returned, and continue to keep it to this day. This answer, and their retention of the draft, might well, under the circumstances, be treated as an acceptance. Such conduct at least shows that they considered themselves bound to accept this draft, which was given for goods which they had themselves ordered and caused to be sent to the drawer, and which they well knew were sold on their credit. The circumstance that, at one time the plaintiffs objected to the goods being sent up, although packed, on account of some rumors they had heard about the solvency of the defendants, conclusively shows that the credit was given to them, and that it was to them that the

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plaintiffs looked for payment. If such was not the understanding of both parties, the plaintiffs would not surely have made any such objection, and stated to George Hillman their reasons for making it. From the whole evidence, we are satisfied of the correctness of the conclusion at which the judge below arrived.

Judgment affirmed.

ALEXANDER CHEVALON and Wife v. GUSTAVUS SCHMIDT.

The Commercial Court of New Orleans has no jurisdiction of proceedings to cancel the license of an attorney at law.

The license of an attorney at law cannot be withdrawn or annulled, unless on conviction in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicile of the accused; and there must be a trial by jury. Act 31 March, 1808, s. 6. - 27 March, 1823, s. 3. 22 March, 1826, s. 1.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Hoffman* for the appellants.

Schmidt, pro se.

MARTIN, J. The plaintiffs obtained a rule on the defendant to show cause, why he should not pay the balance due on a judgment against him in their favor, it being for money alleged to have been collected as an attorney at law, or such further order be taken in the premises as the law directs. The court discharged the rule, being of opinion that, as the plaintiffs had brought suit in the ordinary form, and prosecuted it to a judgment, it was a merger of the debt, and a waiver of all proceedings against the defendant as an attorney at law. From this judgment the plaintiffs have appealed.

It does not appear to us that the court erred, although the reasons given for the judgment may not be the best. The rule was taken to compel the payment of the balance of a judgment, which can be obtained by a writ of *feri facias*. The Commercial Court is without authority to act on the ulterior proceedings hinted at in the rule. It is a court of limited jurisdiction; and it seems to us that, when the 6th section of the act of 1808, the

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3d section of the act of 1823, and the 1st section of the act of 1826 (B. & C.'s Dig. pp. 22, 23, 24), are considered, an attorney's license cannot be withdrawn and annulled, unless on *conviction*, in the manner pointed out by the second of those acts. There must be a proceeding by information before the District Court or judge, and a trial by jury, as required by law. The term *conviction*, as used in the statute, is not a judgment pronounced in a civil case, commenced and prosecuted as the one before us has been.

We do not wish to be understood as admitting, that the judgment obtained by the plaintiff is a waiver of the proceedings under the acts of the legislature; and it is due to the defendant that we should state, that the record contains an admission of the attorney who obtained the judgment, that it is not to be used as evidence of the money having been received by the defendant in his capacity of attorney at law.

Judgment affirmed.

SARAH W. LILES v. THE NEW ORLEANS CANAL AND BANKING COMPANY.

Damages cannot be recovered for the temporary detention of a note, where the only evidence that plaintiff sustained any damage, is the testimony of two witnesses, who swear that, in their opinion, she sustained damage to a certain amount, and neither states any fact upon which his opinion is based.

APPEAL from the District Court of the First District, *Buchanan, J.*

Chinn, for the appellant.

F. B. Conrad, for the defendants.

MARTIN, J. This case was lately before us (6 Robinson 273), when the judgment was reversed, so far as the confirmation of the judgment by default gives damages, and remanded for further proceedings.

The defendants pleaded the general issue, and particularly that the plaintiff was entitled to no damages for the detention of the note, because she did not sustain any, and the defendants re-

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tained the note a short time, as they were entitled to do, in order to ascertain whether the information they had received that they had rights thereto was correct.

The first judge gave judgment for the defendants, being of opinion that there was no evidence of the note having been taken by the bank, with the knowledge that the holder was without authority to dispose of it. The plaintiff appealed.

Our attention is first arrested by a bill of exceptions to the reading of the testimony of a witness, taken on the confirmation of the judgment by default, the witness being now absent from the State. This was excepted to, on the ground that the testimony was taken *ex parte*, without notice to the defendants, who had no opportunity of cross-examining the witness. The testimony coming up with the record, we have looked into it, and as it contains nothing material, we have thought it best not to spend any time in enquiring into its admissibility.

On the merits, we have the testimony of the plaintiff's attorney, who deposes, indeed, that, *in his opinion*, his client has sustained damages to the amount of five hundred dollars. The other witness, whose testimony was excepted to, says he came to New Orleans from the State of Illinois for the purpose of getting the note; that the plaintiff has been subjected to much trouble, vexation, and expense; and has, *in the witness' opinion*, sustained damages exceeding five hundred dollars, having himself made three trips from Illinois to this place. This witness does not inform us that he charged any thing for his trouble, nor that his journeys were not on other business.

Courts of justice expect from witnesses *facts*, not *opinions*, and neither of the above witnesses has imparted to us any fact upon which his opinion is based, the testimony being extremely vague.

The note bears interest at the rate of ten per cent per annum, and the solvability of the maker has not been questioned. The bank retained it but a short time; they may have erred in their right to do so, but they appear to have acted in good faith. The plaintiff has failed to show that she sustained any damages. On that ground, the judge, in our opinion, did not err in giving judgment for the defendants.

Judgment affirmed.

HENRY A. HOFFMEYER v. ACHILLE RIVARDE and others.

APPEAL from the District Court of the First District, *Buchanan, J.*

Latour, for the appellant.

Canon, for the defendants.

MORPHY, J. The petitioner claims, on a *quantum meruit*, \$1,394 70, as a balance due him for his services, as a book-keeper in the defendants' employ from the 15th of June, 1842, to the 15th of November, 1843, at the rate of \$1800 per annum. The defendants denied their indebtedness, and averred that he had already received from them more than his services were worth. There was a judgment below in favor of the plaintiff for \$544 70, from which the defendants appealed; and the plaintiff has prayed that the judgment be annulled, so as to allow him an annual salary of \$1500, instead of that of \$1200 allowed to him below. In relation to the value of the plaintiff's services as a book-keeper, the testimony is contradictory and variant. One witness values them at from \$1500 to \$1800; another at from \$1200 to \$1500; a third at from \$1000 to 1200; &c. A witness, who is a book-keeper in a house engaged in the same business as the defendants, who are commission merchants, says that he receives from his employers \$1200 per annum, and that he is always at work from seven or eight o'clock in the morning to ten or eleven at night. All the witnesses agree that, in June, 1842, places were scarce, and salaries very low, a great number of clerks having been thrown out of employment in consequence of the numerous bankruptcies which happened at, or shortly before, that time. It is shown that when the plaintiff was engaged as a book-keeper by the defendants, a great many applications were made for the situation, and that one Maillard offered to take it at \$50 per month. It is further shown that while in the employ of the defendants, the plaintiff had leisure to keep other books than theirs, to give lessons in the art of book-keeping, and to undertake other jobs, whereby his gains and emoluments were greatly increased. On an examination of the whole evidence taken together, we are by no means satisfied that the

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judge did not allow to the plaintiff a sufficient and just compensation for his services.

Judgment affirmed.

JESSE D. CARR v. LARKIN F. WOODS and another.

After the dissolution of a partnership, no one of the partners can use the social name so as to bind the rest. To draw or endorse a note in the name of the partnership, the authority must be express and special.

One who has paid in consequence of his endorsement, given to the liquidating partners after the dissolution of the partnership, cannot, as endorser, recover of the other partners on the note thus paid by him, although the consideration of the note was a debt due by the firm; nor can he recover on an account, stating such payment as an item. He might recover on showing that he had paid a debt due before the dissolution of the partnership, to the extent to which the partnership had profited by the payment.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. The petitioner alleges that the defendants owe him, *in solido*, \$783 48, being the balance of an account current between him and the late commercial partnership of Douglass, Woods & Co., of which the defendants were members, as detailed in the account annexed to the petition.

The defendant Hills denied that he is in any way indebted to the plaintiff, or that the persons with whom he contracted had any authority to bind him at the time, or that he was a partner of the house of Douglas, Woods & Co.; and he denies generally the matters alleged.

The court below being satisfied from the evidence that the liability sought to be fastened upon Hills was the result of renewals of a note, not proved to have been given to the firm of Douglass, Woods & Co., and that a liquidating partner has no right to renew notes, and thus fasten new obligations on his partners, gave judgment for the defendant Hills, and the plaintiff appealed.

The principle here laid down is well settled, and has been recognized in several cases by this court, and particularly in *Rudy v. Harding et al.* (6 Robinson, 70), in which we held that, after the dissolution of a partnership, no one of the partners can use

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the social name so as to bind the others ; and that to draw or endorse a note in the name of the former partnership, the authority must be express and special. The only enquiry, therefore, is one of fact—did the claim of the plaintiff arise out of endorsements made by the plaintiff for some of the partners, without the consent of the defendant Hills ?

The partnership was dissolved, in October, 1837. The acknowledgment, signed "*Douglass, Woods & Co., in liquidation,*" bears date in 1841 ; and the items of the account are dated from January, 1840, to July, 1841. The principal item on the debit side is : "To cash paid your two notes, protests and interest, and five per cent for advancing, \$1,825." Another part of the account, originally due to Carr & Shearon, embraces transactions in 1839. One of the witnesses swears that the account is just and correct, item by item ; but he does not prove, that the debt discharged by the plaintiff was due by the firm before its dissolution. If the plaintiff's obligation to pay arose from his endorsement given to the liquidating partners after the dissolution of the partnership, although the consideration of the note so given may have been a debt due by the firm, the endorser could not recover of the other partners on the note thus taken up, as endorser ; neither can he recover on an account stating such payments as items. He might recover, if he could show that he had paid a debt due before the dissolution of the partnership, to the extent that the partnership had in fact profited by the payment. Such evidence is wanting in this case ; and, in the form in which the action is brought, and the debt is stated to have arisen, we concur with the court below, that the plaintiff cannot recover. But the judgment ought to be one of non-suit.

The judgment of the Commercial Court is, therefore, affirmed, as in case of non-suit, with costs.

Benjamin, for the appellant.

G. Strawbridge, contra.

Hullin, Syndic, and another v. The Second Municipality of New Orleans.

JAMES B. HULLIN, Syndic of the Creditors of Thomas Barrett, an Insolvent, and RICHARD RICHARDSON, Syndic of the Creditors of of Maurice Cannon, an Insolvent, v. THE SECOND MUNICIPALITY OF NEW ORLEANS.

Where proceedings instituted by one of the Municipalities of New Orleans, under the act of 3 April, 1832, regulating the opening and improving of streets and public places, have been discontinued before any final confirmation by the court of the report of the assessors, the owners of property required for the improvement, and assessed at a certain price, cannot claim the amount on the ground of an implied sale, though the Municipality have taken possession of the premises. *Per Curiam*: The proceedings not having been perfected, the parties can claim no rights under them; the plaintiffs can only demand the premises, or damages for the injury resulting from having been deprived of them.

APPEAL from the District Court of the First District, *Buchanan, J.*

L. Janin and Benjamin, for the appellants.

Micou and Rawle, for the defendants.

MARTIN, J. The plaintiffs claim the price of a lot of ground, the joint property of their insolvents, taken possession of by the defendants for the purpose of widening Roffignac street. The proceedings begun by the Municipality in order to acquire the property of the said lot, having been discontinued, notwithstanding the strenuous and successful opposition of the present plaintiffs in the District Court, whose judgment was reversed (4 Rob. 357), we then expressed our opinion, that it could not be pretended that the title to the lot was vested in the Municipality, by virtue of those proceedings; but we added that, whether the act of taking possession under the circumstances then shown, amounted to a consent on the part of the Municipality to pay for the lots, according to either of the appraisements made during the course of said proceedings, was a question foreign to the one we were then considering, to wit, whether the Municipality had a right to discontinue.

The present suit has for its object to obtain a judicial opinion on the question which we declared to be foreign to that which was decided by us. The petition urges the existence of an implied contract to pay the value of the premises, under which the

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transfer of said property to the Municipality became complete, as well as the right of plaintiffs to the price. The District Court dismissed the petition, being of opinion that the pretensions of the plaintiffs were in direct opposition to the decision of this court in the case cited, and the plaintiffs appealed. Their counsel has not enabled us to discover that we may now express any opinion different from that on which the District Court has relied. The inchoate proceedings in said court never having been perfected, none of the parties thereto can claim any rights under them. Their respective rights are as yet such as they existed on the inception of those proceedings, unless damages may be claimed on grounds posterior to them. The plaintiffs may, therefore, demand the premises, or damages for the injury resulting from their having been deprived of them. But there being no express or implied contract of sale, there cannot be a claim for a price.

Judgment affirmed.

JAMES REED and others v. THOMAS POWELL.

The powers and duties of the officers of a bank being defined by its charter and by laws, they will, when acting within the sphere of their respective duties, represent the corporation, and bind it by their acts; but in other matters they can only represent or act for it when authorized by a resolution of the board of directors.

A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for a syndic. A resolution of the board of directors can alone empower him to do so. But a ratification by the directors of the acts of a cashier who had voted at a meeting of creditors without authority, made after the proceedings before the notary were closed, and the ten days had expired after which the rights of the parties claiming the syndicship became fixed, cannot affect rights previously acquired. C. C. 1789, 2252. Act 20 February, 1817.

APPEAL from the District Court of the First District, *Buchanan, J.*

J. C. Clark and F. B. Conrad, for the appellants, cited *The Union Bank v. Bagley*, 10 Robinson, 43.

Hoffman, contra, cited Civil Code, arts. 2252, 1789. 3 Delvincourt, pp. 380, 381 note. Story on Agency, 245, 250, 346-7.

Olney v. Walker, 12 La. 245. 8 La. 568. 7 Mart. N. S. 374. 10 La. 516. 9 La. 392-6.

MORPHY, J. This appeal is taken by Wm. H. Wheaton, from a judgment sustaining an opposition to his appointment as syndic of the creditors of Thomas Powell, and declaring John D. Fink to be the duly appointed syndic of the estate. Several votes received by Wheaton were objected to as illegal at the meeting of the creditors of the insolvent, and in the opposition subsequently filed in the court below; but, under an agreement in the record, we are to confine our attention to that given him by N. N. Wilkinson, as cashier of the Canal Bank for \$38,892, which was rejected by the judgment appealed from, on the ground that the cashier was without authority to give such vote.

The facts of the case appear to be that, on the 16th of September, 1844, when the creditors met, the directors of the Canal Bank were all absent from the city, with the exception of Glendy Burke, the president. The cashier considered himself authorized to represent the bank, and, after consulting with the president, he appeared at the meeting, made oath to the amount of Powell's indebtedness to the bank, voted for W. H. Wheaton to be syndic, dispensed, on behalf of the bank, with the security required by law, and directed the property surrendered to be sold for cash. On the 9th of October following, a meeting of the directors took place, at which the cashier reported to the board that, in the absence of a quorum from the city, he had appeared on behalf of the bank at a meeting of Powell's creditors, and had there voted for W. H. Wheaton to be the syndic of the estate. A resolution was then passed approving the vote thus given by the cashier in favor of Wheaton. It is urged by the appellant's counsel that the vote of the cashier should have been counted by the judge below; that it was a mere act of administration to which he was fully competent, and which grew out of the necessity of the case, no *quorum* of the board being present in the city. The directors are the general agents and administrators of the corporation, and by the charter are empowered to appoint such officers and sub-agents as may be necessary for the transaction of its business. The powers and duties

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of these officers are defined by the charter and by-laws of the bank. Within the sphere of their respective duties, they represent the corporation, and bind it by their acts; but in all matters and things not properly belonging to their office, they cannot represent or act for the corporation, unless specially or generally authorized so to do by a resolution of the board. Thus the cashier, who is entrusted with the transaction of the banking business of the corporation, needs no special authority to do and perform any act required for the proper management and dispatch of the same; but when it becomes necessary for the corporation to appoint an agent for any particular purpose, or to do any other thing not properly belonging to the duties of his office, he has no better right to act than any other person. To say that he can make such an appointment, or do any other act on behalf of the corporation, because it is a mere act of administration, would be to make the cashier its general agent and administrator, instead of the board of directors. We conclude that N. N. Wilkinson was without authority, *virtute officii*, to represent the Canal Bank at the meeting of the creditors, and to vote for a syndic on its behalf, and could have done it legally only under a resolution of the board. If so, the absence of the directors, or their neglect to attend to their duties, could not confer upon him such authority. In the case of *The Union Bank v. Bagley* (10 Rob. 43), which is relied on by the appellants, the cashier of the branch at Covington had appeared at a meeting of creditors, voted for a syndic, and discharged the insolvent. His right to appear for the bank and vote for a syndic was not contested. The only question before the court was, whether he could validly have granted such discharge, without an express power from the board to that effect? We held that he could not, as the granting of a discharge was an act of alienation, which should have been expressly authorized. But it is insisted that if Wilkinson was without authority to represent the bank, his acts were ratified by the board, and that such ratification relates back to the time when these acts were done. This is true; but the limitation to the rule is, that such ratification shall not affect or impair rights legally acquired in the mean time. The board ratified the vote of the cashier only after the pro-



ceedings before the notary were closed, and when the ten days had expired, after which the rights of the parties claiming to be syndic became fixed by law. The votes legally given, and which alone could then be counted, gave Fink a large majority. His rights as a third party being once vested, could not be affected by anything done afterwards. Civil Code, arts. 2252, 1789. B. & C.'s Dig. p. 490. Angel & Ames on Corporations, p. 174. Story on Agency, No. 246.

Judgment affirmed.

VICTOR ROUMAGE V. PIERRE BLATRIER.

Where a lessee for years, and his surety, abandon the premises, the lessor, for the preservation of the property and the protection of his rights, may collect the rent due from the sub-tenants and procure new ones, for the benefit of the lessee or surety; and where the lessor has never refused to place the premises under their control on their complying with the lease, such acts will not be considered as amounting to a cancelling of the lease, and the lessee and his surety will be bound for the difference between the amount of the lease and that received from the sub-tenants.

Where pending an action to enjoin an execution issued on a judgment obtained by a lessor against the surety of his lessee, for the amount of a lease for years, to be paid from time to time as the rent may become due under the lease, the lessor sells the premises, without any stipulation that the sale is made subject to the lease, the lease will be thereby dissolved.

APPEAL from the District Court of the First District, *Buchanan, J.*

Eyma, for the plaintiff.

Buscail, for the appellant.

SMOX, J. The defendant, who, as an absentee, has been sued through his agent or attorney in fact, is appellant from a judgment which declares the dissolution of a lease by him made to one Fessard, of certain premises situated in New Orleans, by a notarial act, executed on the 8th of February, 1841, to take effect from the 1st of November ensuing; and which perpetuates the injunction obtained by the plaintiff, for all rents which would have been due under said lease, and under a judgment heretofore rendered between the parties to the same, from the 1st day of November, 1843.

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It appears from the record that the lease in question was executed by the defendant's agent to Fessard, for the term of five years, to run from the 1st of November, 1841, for and in consideration of an annual rent of three thousand dollars, to be paid at the rate of two hundred and fifty dollars for each month, at the end of every month; and that the plaintiff intervened in the act, and bound himself *in solido* with the lessee, for the punctual payment of the rent for and during the whole period of the lease. The lessee took possession of the premises, paid the first two months, but, having ceased to pay, a suit was brought against him for the rent due and to become due, and a judgment was rendered against him, on the 20th of May, 1842, with privilege on the goods provisionally seized, for the sum of \$14,000, \$1,000 of which was due and payable at the time the judgment was rendered, and the balance to be collected by executions to be issued monthly, according to the lease. The rent was paid up to the 1st of April, 1843, when on the 22d of May, a suit was instituted by the lessor against Roumage for one months' rent, and a judgment was rendered against the latter accordingly. Previous, however, to the institution of said suit, Roumage had written a letter to the appellant's agent, dated 1st May, 1843, representing the impossibility from considerable losses him experienced, of his continuing to pay him any longer "*la différence qui existe entre le loyer que je reçois, et celui que vous me réclamez chaque mois;*" and further stating: "*Il y a bien peu de générosité de sa part (the lessor's) d'avoir voulu profiter de la circonstance où m'a placé la fuite de M. Fessard pour maintenir ses mêmes prétensions auxquelles je me suis soumis tant que j'ai pu le faire, mais que les circonstances m'obligent de cesser.*" He adds also: "*Vous avez ci bas les noms des locataires qui habitent la maison, qui payent très exactement chaque mois, &c. Je me plais à croire, Monsieur, que vous apprécierez la situation où je me trouve, et que vous accepterez à l'aimable la proposition que je vous fais, qui est la seule que je puis vous offrir, dans l'intérêt du propriétaire que vous représentez.*" This proposition, far from being accepted, was followed by the suit already alluded to, and, on the 29th of June following, another suit was brought against Roumage for one months' rent previously due, and for the remainder of the whole

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term, expiring on the 1st of November, 1846; whereupon, after issue joined by the defendant, a judgment was rendered against him, not only for the amount of one months' rent, but also for the sum of \$10,250, for the remainder of the lease, to be paid, to wit: the sum of \$1,750, within ten days from the date of the judgment (29th of November, 1843); and \$250 on the first day of every month thereafter until the 1st of November, 1846. It is proper to remark that the issue joined by the defendant consisted in a general denial, and in the plea that the plaintiff had no right to obtain judgment as prayed for; and that after it was admitted that Fessard had left the State, the letter written by Roumage to the lessor's agent, above recited, was produced in evidence by the plaintiff.

On the 15th of December, an execution having issued on the last judgment, the present suit was instituted, and an injunction subsequently sued out, for the purpose of obtaining the dissolution of the lease from the 1st of May, 1843, and of perpetuating the injunction. The principal grounds upon which the plaintiff bases his demand, are, that since said judgment was obtained, the petitioner has learned that the lessor's agent, had, on or about the 15th of October, 1843, leased the whole or part of the premises to new tenants, without the consent of the petitioner, and without giving him any notice of the fact; that said lessor has thereby accepted the annulling of said lease, in accordance with the letter written to him by the petitioner; that the conduct of the lessor's agent must be considered as a breach of the said contract of lease; and that when the said agent obtained the judgment complained of, he well knew that said lease had been dissolved by the effect of his letting the whole, or part of the premises, himself to other persons.

This action was answered by the defendant, who first excepted to the plaintiff's demand on the grounds that the latter had no right to ask for the dissolution of the lease, as he is not the principal party to the contract, but only an accessory; and that the matter in controversy has been settled by two judgments rendered against him, &c. The defendant further pleaded the general issue, and claimed in reconvention a sum of \$1,200

damages, for the trouble and expense resulting from this suit, &c,

The judgment appealed from was founded mainly on the grounds that by subsequently leasing portions of the premises to other persons, the defendant, through his agent, had violated his obligations; that obligations are extinguished by the effect of the resolutive condition: and that whether Roumage be considered as the co-obligor, or as the surety of the lessee, he is equally at liberty to avail himself of the violation of the contract by the lessor, and to discharge himself from his obligations.

The evidence shows that divers tenants who had originally contracted with the plaintiff, continued after the date of his letter, to occupy the portions of the premises which they had previously possessed, and that when Barrière, the defendant's agent, undertook to collect the rent, he received it under the same terms as had been agreed on between the tenants and Roumage. In the month of November, however, Barrière thought proper to lease divers portions of the premises to other tenants; and when he settled with them for the rent at subsequent periods, he gave them receipts in his own name; those receipts, fifteen in number, were produced in evidence. They bear the dates of July, August, September, October, November, December, 1843, and January and February, 1844, and specify, *without any exception*, that the sums paid were received by Barrière: "*En déduction de ce que doit V. Roumage, en sa qualité de caution de Charles Fessard, locataire principal.*" This reservation exists not only upon the receipts given to the old tenants, but also upon those given to the new ones, who, although it is stated by the witnesses Lecourt, Gosseth, and others that Barrière did not tell them that he was leasing the premises for account of Roumage, were sufficiently apprized thereby that Fessard was the principal lessee, and that the amounts paid were received on account of the rent due by Roumage as Fessard's surety. Divers sums were also paid by the tenants to the sheriff, who gave them receipts accordingly, and it seems from the testimony adduced that, after the date of Roumage's letter already recited, he abstained from calling upon the tenants for the

payment of the rents, did not even collect the rents due for April, and that Barrière uniformly collected the rents from the time of the sheriff's return of the writ of provisional seizure (1st of August, 1843). The record contains also two accounts current, to wit: one by which Roumage is debited with the sum due by him on the 30th of November, 1843, being \$1,750, and credited with the rents received by Barrière in August, September, October, November, and December, 1843; and the other, a statement of the sums due monthly by the tenants, and collected by Barrière from the month of May inclusively, to the 15th of October, 1843. And it is further admitted that the receipts of Joas (one of the tenants) since August, are in the name of Barrière.

Under this state of facts, how can the plaintiff pretend that his lessor has violated his obligations, and that he, plaintiff, is discharged from his contract? It appears from the very letter upon which he relies, and which contains the proposals which, he says, were subsequently accepted by the defendant, that he was previously in the habit of paying the difference which existed between the sums which he received for rent from the sub-tenants, and the amount due every month under the lease; he complains of the hardship of the circumstance which subjected him to complying with the defendant's pretensions, but his proposals do not go further than intimating to the lessor that *he will cease paying the difference* to which he had previously and regularly subjected himself since the departure of the lessee, and that the defendant ought to be satisfied with the rent paid monthly by the sub-tenants. Was this proposition accepted so as to release the plaintiff from his obligations? and do the acts of the defendant's agent amount to an acceptance?

We have already seen that immediately after the plaintiff's letter reached the defendant, the latter instituted a suit against him for one month's rent; that, shortly after, he brought another suit against him for the amount to be due for the remainder of the whole term; and that, notwithstanding the production of his letter, said plaintiff was declared, in the judgment rendered on the 29th of November, 1843, to be liable for the whole amount of the rent until the expiration of the lease. At

the time of, and before said judgment was rendered, from which no appeal has ever been taken, the defendant had already received several months' rent from the sub-tenants, and a large portion of the receipts produced in evidence in this case were in existence; nay, the lessor's agent, from the month of August, and perhaps before, had declared to the sheriff that he would in future collect the rents. The plaintiff, since the month of April, had determined to cease collecting said rents; he had notified the defendant of his determination, and of his refusal to pay any further difference. This was clearly a declaration on his part that he abandoned the premises; and what was the lessor to do? He took care of the property abandoned by the lessee and his co-obligor; kept the old sub-tenants, procured new tenants, and collected the rents for the benefit of the plaintiff, with the express declaration that it was *on account of the rent due under the lease*; and we are at a loss to conceive how the judge *a quo* could come to the conclusion that such acts of the lessor amounted to a violation of his obligations, and consequently to the dissolution of the lease. The plaintiff has not shown that he ever called upon the defendant to re-deliver to him possession of the premises; he had never been disturbed in his previous possession as long as he paid the rent; the proceedings had against him were the consequence of his failing to comply with his obligations; and if the lessor was subsequently compelled, for the preservation of the property, and for the protection of his rights, to collect the rents, and to sub-lease the premises to other tenants, this was the plaintiff's own fault, and not the lessor's, who gave him the benefit of the collection of the rents, and who never refused to replace the premises under his control, on his complying with the contract which he had abandoned.

Pothier, in his *Contrat de Louage*, No. 151, says: "*Lorsque l'empêchement qui a empêché le locataire d'entrer en jouissance de la maison qui lui a été louée, ou qui l'a empêché de la continuer est un empêchement qui ne vient que de la part du locataire, il ne peut pas pour cela demander la remise des loyers. Il suffit que la maison soit exploitable, que le locateur soit prêt à en accorder la jouissance au locataire, et que le locataire puisse l'occuper, ou par lui ou par d'autres, pour que les loyers soient dus.*" This, says the author,

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is in conformity with the fourth principle which is laid down in No. 142, which is: "*Le conducteur, locataire, ou fermier ne peut demander remise du loyer, lorsque l'empêchement est venu de sa part. Il suffit, en ce cas, qu'il y ait une jouissance possible, ou usage possible de la chose, ou par lui ou par d'autres, pour que le loyer en soit dû.*" This principle is fully applicable to the present case. Here, the lessee abandoned the premises a short time after the lease was in operation; his co-obligor continued to pay the rent until May, 1843, when he thought proper to discontinue the payment of said rent, and to notify the lessor of his determination; he also abandoned the premises, and declined exercising any further control over them. Was not this an impediment (*empêchement*) resulting from his own act? What shows that there was no possibility of his resuming the use or enjoyment of the property, whenever he pleased? The lease had not expired; the lessor had only taken a temporary possession, or administration of the premises; he received the rents for the benefit of the lessee, and because the latter had refused to collect them any longer; those rents were expressly applied to the discharge of the lessee's obligations; and it appears to us that this was no violation of the contract, that it never ceased to be operative, and that the plaintiff, who had no reason to complain, never ceased to owe the rent which he originally contracted to pay. In the case of *Christy v. Casenave* (2 Mart. N. S. 453), this court recognized the principles that if, on a lease for years, the lessee abandon the premises, the landlord may demand the rent for the whole term, and that *such lessee is bound to pay the sum between what the lessor has been able to rent the premises for, since they were abandoned, and that which was stipulated between the parties to the original contract.* This doctrine was again adopted in the case of *Reynolds v. Swain* (13 La. 198). It is just and equitable, and should govern the present case.

With this view of the question, we must conclude that the lease was not dissolved, and that the judgment enjoined had not ceased, when this suit was instituted, to have its effect; but as said judgment is for the whole amount of the rent due, or to be due for the whole term, (until the 1st of November, 1846), we think it ought not to preclude the plaintiff from demanding the

credits to which he may be entitled from the collection of the rents, or from showing the circumstances which, at a subsequent period, may have destroyed the effect or operation of the lease, and consequently of the said judgment. It has been asserted in the argument, not denied, and even assented to, that the premises had been sold during the pendency of this action; and we find, accompanying the record, a newspaper which was filed, in which the property is advertised for sale, and in which it is stated that it was rented last year (1843) for \$250 per month, and produces now (January 1845) \$180 per month. The property does not appear to have been intended to be sold subject to the lease; and, if these facts are true, we are not ready to say that the lease should not be considered as dissolved from the time of the sale. Be this as it may, we are disposed to extend now to the plaintiff all the relief which he may be legally entitled to; and, without its being necessary for him to institute a new action for that purpose, we think the rights of the parties, as they grow out of the lease and judgment in question, subject to be modified, affected, or even destroyed by their subsequent acts, can very properly be investigated and liquidated in this action. The judgment enjoined being prospective in its effect and operation, we see no reason, why such effect and operation should not be enquired into in this suit, to a further extent than the circumstances that existed at the time of its institution; and we are of opinion that justice requires that this case should be remanded for further proceedings, for the purposes: 1st, of enquiring into the fact of the sale of the premises during the pendency of this suit, into the circumstances under which it was made, and into the effect of such sale on the lease in question; 2d, of liquidating the balance which may be due to the appellant for the rent of the premises up to the time of said sale, after deducting from the amount due under the lease, the various sums which the lessor's agent may have received from the tenants, during the period that the property was abandoned by the plaintiff; 3d, of fixing the liability of said plaintiff for the payment of the sum which he really owes under the prospective judgment last rendered against him, as the co-obligor, or surety *in solido* of the lessee; and of perpetuating the

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injunction by him obtained, as to the difference which may result from the said investigation and liquidation, between the amount of said judgment and the sum really due to the lessor at the time of the sale of the premises; and 4th, of making the purchaser and actual owner of the property, a party to these proceedings, to show cause why the lease under consideration should not be dissolved, and rendered ineffectual from the date of said sale to its expiration, and the injunction perpetuated accordingly.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, that the injunction be provisionally maintained, and that this case be remanded to the court *a quâ* for further proceedings, and final adjustment, under the legal principles recognized in this opinion, after making the purchaser and actual owner of the premises a party to this controversy. The costs of this appeal to be borne by the plaintiff and appellee.

ISAAC BALDWIN v. HENRY CARLETON.

An heir cannot be affected by any claim of an executor, unless personally cited to contest it.

A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him.

A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void.

Executors are jointly and severally responsible for the property committed to their charge. C. C. 1674.

In joint demands one of the creditors cannot represent the debtor.

APPEAL from the Parish Court of New Orleans, *Maurian, J.* The plaintiff claims from the defendant \$3,593 60. He represents that by the will of his mother, which was admitted to probate in the parish of Orleans on the 18th February, 1836, he was appointed her universal legatee, and Thomas H. Maddox

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and Henry Carleton, the defendant, her testamentary executors; and that Maddox was also appointed his tutor, he being then a minor and his father dead. That the executors qualified and administered on the estate; that an inventory thereof was made, which embraced all the property in which his deceased mother was interested; and that nearly the whole of the property mentioned in the inventory belonged jointly to his mother and himself, having belonged to his father, who died on the 25th of April, 1833, and had bequeathed his property in equal shares to him and his mother. That Maddox and the defendant rendered an account of their administration, in which they credited themselves with two and a half per cent commissions, as executors, on the amount of the inventories made after the death of his mother, which embraced a large amount of property not belonging to the estate of his mother, thus claiming \$14,374 38, when they were only entitled to one half of that sum, to wit, \$7,187 19, and the defendant alone only to \$3,593 60. That the account was homologated, so far as not opposed, and the sum of \$14,374 38 received by Maddox and Carleton. That on the 27th February, 1840, petitioner attained his majority, and on settling with Maddox, his tutor, ascertained that the executors had been over paid; and that Maddox, as soon as he was informed of the error, refunded the amount, but that the defendant refuses to pay back the sum of \$3,593 60, wrongfully obtained by him.

The defendant pleaded that the commissions, for the recovery of which this action was instituted, were allowed by the Probate Court of the parish of Orleans, a court of competent jurisdiction, in a proceeding to which the legal representative of the plaintiff was a party, which judgment was confirmed by the Supreme Court.

The case turned on the question, whether the plaintiff was bound by the judgment of the Probate Court homologating the accounts of the executors, Maddox and Carleton, the plaintiff being represented by Maddox, his tutor. In these accounts the executors claimed, and by the judgment were allowed the sum of \$14,374 38 for commissions, as alleged in the petition in this suit. There was a judgment below against the defendant for \$3,593 60, from which he appealed.

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L. Janin, for the plaintiff. Isaac Baldwin, the plaintiff's father, died in 1833, leaving a large estate, which descended, in equal shares, to his only child, the plaintiff, and to his widow in community. The widow died in 1836, leaving a will, by which she bequeathed her whole property, with the exception of one legacy, to the plaintiff, and appointed Thomas H. Maddox and the defendant her executors. She also designated Maddox as the testamentary tutor of the plaintiff, then a minor. Maddox, who is a resident of the parish of Rapides, managed the property of the estate, which, with the exception of some moveables, was all situated in that parish. The defendant, a member of the bar of New Orleans, conducted the legal proceedings of the estate, which had been opened in the parish of Orleans. These proceedings were of the simplest kind. Inventories of all the property were made, which had been left at the death of Baldwin. The inventories stated that it belonged in indivision to the estate of Mrs. Baldwin, and to the minor heir of Isaac Baldwin. Some time afterwards the executors filed an account in the Court of Probates. It was made out under the direction of the defendant, who signed the petition as attorney at law. In this account the defendant was credited with a fee of \$7,500, for professional services rendered to the estate; and the executors were credited with \$14,374 38, as commissions, being on the whole property left at the decease of Baldwin, and not only on the half of it which belonged to the estate of Mrs. Baldwin. These were, therefore, double the commissions to which the executors were entitled. The usual advertisements were published, but before the delay expired, Maddox, as tutor and co-executor, filed an opposition, stating that he had been misled by the defendant, under whose advice he had acted, and that he was now informed that the fee of \$7,500 was not due to the defendant. This opposition was tried and carried up to the Supreme Court on appeal, and there the fee was entirely disallowed. During the trial of this opposition, the counsel for Maddox, the tutor and executor, was called upon to make and did make an admission upon record, that he did not contest the commission charged by Carleton, and amounting to \$7,187 19.

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And it was also on his motion that the account had previously been confirmed, so far as not opposed.

In 1840, the plaintiff attained his majority. He had a settlement with his tutor, and then detected the overcharge. As soon as Maddox was informed of his error, he returned one half of the commissions he had received; and this suit was brought to recover the other half from the defendant. The defendant put in a plea to the jurisdiction of the Parish Court, and a plea of *res judicata*. Both were overruled by the Parish Court, and judgment given against him for the amount claimed, and he has appealed.

Under the decision in the case of *Millaudon v. Caius* (6 La. 224), and the laws upon which it is based, the homologation of an executor's account, after ten days' advertisement, is intended exclusively to settle the rank and privileges among the creditors of the estate, and is *res judicata* as to them only; but when the object of the executor is to settle with the heir, to pay over to him the balance in his hands, and to receive discharge, he must cite the heir personally. Here the heir was not cited, nor any one for him. The heir being a minor could not have been cited personally. His tutor should, therefore, have been cited. The tutor, under ordinary circumstances, is, no doubt, the only proper person, and has full power to give a discharge to the executors. But as, in this instance, the tutor was also one of the executors, it would have been absurd to cite himself—the plaintiff in homologation cannot be also the defendant in homologation—he who has to render an account cannot receive the account—he cannot discharge himself. If such a nugatory attempt had been made, the court would have declared it a proceeding without parties. And if Maddox, the executor, could not have cited Maddox, the tutor, and if his appearance in answer to such a citation would have been illusory, it follows that his voluntary appearance can produce no greater effect. A stronger case of opposition of interest between the minor and the tutor cannot be imagined. It was, therefore, necessary to cite the under-tutor. Civil Code, art. 301. Code of Pract, art. 117. And as Henry Lockett, the under-tutor, had also

an adverse interest to the minor, an under-tutor, *ad hoc*, ought to have been specially appointed and cited.

It is contended that Maddox' interest was not opposed to that of the minor, because he was to receive no part of the excess of commissions charged and received by Carleton, and that his interest in the question of the right to claim such commissions was not sufficient to disqualify him.

It is not without due reflection that we submit, that this doctrine is contrary to law, and most dangerous in its consequences. It would be a sufficient answer that he who renders the account cannot receive it and discharge himself. We may add, that executors are bound jointly and severally; that, therefore, Maddox, as executor, was bound to make good to the minor what Carleton took without being entitled to it; that when the account was presented, the money had already been received, or rather retained, by Carleton, and that therefore Maddox had an undoubted direct pecuniary interest (if he had been guided by pecuniary interest only,) to prevent inquiry, to stifle the claim of the minor, and to procure a homologation binding upon the minor, and relieving himself and his co-executor from responsibility. Nay, how could a double commission be allowed to Carleton, without being at the same time allowed to Maddox? Would Carleton, after having received double commissions himself, have acted in the interest of the estate confided to him, and refused them to Maddox? The very interest in the question is sufficient to disqualify the tutor—it is an indirect but palpable one; the law makes no distinction between the direct and indirect interest which incapacitates the tutor; this distinction is of an abstruse, impracticable and over-refined character; the interest is glaring, and no subtle reasoning can brush it away; and it is not to such temptations that either the tutor or the minor are to be exposed.

If, in the former suit between the same parties, Carleton was not permitted to assume two characters, that of executor and of counsel to the executor, and to allow a compensation to himself, how much less can Maddox, the tutor, and Maddox, the executor, make a contract with one another—nay, do more, sustain a suit

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with one another, and produce a judgment for one and against the other.

The errors in the account were the work of the defendant, under whose professional advice and direction Maddox acted. Suddenly informed of one of them, Maddox, then on the eve of returning home, employs counsel to arrest its effects, and, with this exception, to have the account homologated, for he believed it correct in all other respects. The counsel's attention was confined to the only matter for which he was employed. When the trial of the matter in contest came on, he discovered accidentally the double charge of commissions, and made some intelligible remarks upon it. Maddox was then in the parish of Rapides; the counsel could not, of his own accord, make a new opposition; it was too late for Maddox to do so, as on his motion the account had been homologated, and no means were left to the counsel to keep the matter in suspense.

We have already said that the account, and the error in it, were Carleton's work; it was only in relation to the claim for a fee that Maddox employed new counsel—he believed every thing else in the account correct: when he directed the account to be homologated, he still labored under the error produced by the defendant acting professionally. Carleton was the executor and legal adviser of the estate; indeed he did, and from his situation could, render no other but legal services in the settlement of the estate; and in Mrs. Baldwin's will, he was designated as the tutor of the minor, in case of the inability of Maddox. Carleton stood, therefore, in the most confidential relation possible to the heir, and had the duties of a friend, adviser and father to perform. The law makes a radical distinction between parties thus differently conditioned. This distinction pervades every system of jurisprudence. The greater the trust, and the greater the means for defrauding, the greater is the protection of the law. A person thus situated, is not permitted to screen himself behind legal cobwebs of his own weaving. But this would require developments for which this is not the place.

It is clear that the plaintiff has been defrauded. It is clear

that he has no remedy except against Carleton, who received, or rather took, what he was not entitled to. If the plaintiff had indeed, at any time, a remedy against Maddox, and Maddox sought to recover over against Carleton, Carleton would have answered him with the account and decree of homologation; that is, he would have defied, and thrown the loss upon his own innocent client, because the client had followed the advice given to him by Carleton.

It would be a disgrace to our jurisprudence if a fraud of so deep a die could go unpunished. It would bring deserved contempt and distrust upon the legal profession, if its members were ever permitted to prostitute the noble science of the law to the knitting of meshes, in which to catch their own clients, and others who rely on their professional knowledge and skill.

R. Hunt and *Micou*, for the appellant. It is contended that the tutor had an interest in the commissions, and, therefore, could not represent the minor. We reply, *first*, that he had no interest in the commissions to be received by his co-executor; and *secondly*, that even if interested, the judgment is binding upon the minor, until reversed or annulled.

First. Maddox acting as tutor—appearing as such, was certainly competent to represent the minor in all questions except those in which he had a direct, immediate, and adverse interest to him. He had no interest in the share of commissions to be received by his co-executor. He was not enriched by their allowance, nor would he have been impoverished by their refusal. On the contrary, under his double responsibility, as executor and as tutor, he had a direct interest in refusing an undue allowance, and the record shows with what zeal he performed his duty. The interest in the rate of commissions was not sufficient to disqualify him, and none other existed or can be imagined.

The question is, whether Maddox had such an interest in the commissions as disqualified him from opposing them at the time, on behalf of the minor? If he had no such disqualifying interest, and allowed them to be confirmed without opposition, the only question that could afterwards arise, would be between him and his ward when he came of age.

That Maddox's interest was not identical with Carleton's, will appear from this: Suppose Carleton had received his commissions, and resigned at the end of one year, on the executors rendering an account thus far. Suppose Maddox had continued to act alone, and had not claimed his commissions until he rendered his account in the second year. It is plain that the allowance made to Carleton could not avail Maddox, if his commissions were disputed. He would have an interest in the question only; that is, a hope that the allowance made to Carleton would aid him in obtaining his own. Whether such an interest disqualifies him from acting for the minor, is the only point that can now be raised.

The position of Maddox is like that of a witness called to testify in a cause where he has an interest in *the question* only. Such an interest does not disqualify a witness in any court in the world, though his testimony might be the basis of a judgment which he hoped might serve him in his own case. Even where one underwriter was sued, another underwriter to the same instrument was allowed to testify for the defendant.

Such, too, is the established course of decisions in Louisiana. See 3 Mart. N. S. 11, 275.

Suppose Maddox and a third person had each held a promissory note against the estate, both of same date and amount, and both had been prescribed before the death of the deceased, and these notes had been allowed by the homologation, could Baldwin, when of age, recover back the money from such third person, on the ground that Maddox was interested in the question of prescription?

Several physicians attended the deceased while she was sick. Dr. Maddox was one. Their attendance was the same, services the same, the items of their accounts were the same, but all charged four fold more than the tariff fixed by law; yet Maddox admitted their correctness, as he did Carleton's, whereupon they were all homologated by the court. Could Baldwin, when of age, recover back from one of the other physicians the excess above what the law allowed, on the ground that Maddox was interested in the question?

Executors and tutors often render long accounts, filled with

a multitude of items, whereby they may have, in the complicated transactions of life, an interest in many questions that arise. If, for that reason, the homologation could be attacked, few could withstand the assault. Some discovery may yet be made, some afterthought may still arise, and this very account of administration may become the source of other litigation, and the judgment of homologation be treated as a mere nullity.

The plaintiff's counsel is mistaken in supposing that Lockett was disqualified, by his interest, from appearing as under-tutor. His interest was limited to the fees for professional services; he had no interest in the commissions claimed by Carleton and Maddox.

Plaintiff's counsel says truly, that the executors were "severally and jointly bound" towards the minor.

If Maddox had an interest in swelling the commissions, he had, on the other hand, a direct interest in resisting Carleton's claim, for being bound *in solido*, he was responsible to Baldwin for every dollar that Carleton unduly received. The law binds them *in solido*, in order to sharpen their vigilance over the conduct of each other. On this point there is no difference of opinion; for, by an act on file in the records in this case, Baldwin, when he came of age, released Maddox from this very responsibility—that is, for any excess he may have permitted Carleton to receive. Here Baldwin gives up the very point in controversy. Maddox was responsible, and Baldwin releases that responsibility.

But this release being made long after the homologation of the account, cannot affect the competency of Maddox at the time. It cannot retroact and destroy a competency that was perfect in both his capacity as executor and tutor, at the time of the allowance.

Second. Even if the tutor had an adverse interest, the minor is bound by the judgment, until regularly reversed or annulled. The position, that whenever it can be made to appear that a tutor provoking a judgment had an adverse interest to the ward, such judgment at once becomes a *mere nullity*, is unsupported by reason or authority. The law intends that higher faith and

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efficacy shall be given to the solemn judgments of its courts. The tutor may incur a liability to his ward, for the consequences of his error or his fraud ; but the judgment cannot be set aside, except in the modes prescribed by law.

These modes are by an action of nullity in the court which rendered the judgment, or by appeal. Whether the defect results from want of citation, error, or fraud, these remedies, and these alone, are permitted. That they are effective as well as proper remedies, the plaintiff can scarcely deny. He was relieved on his appeal from one item of this account, and if, while the appeal was pending, another item had been shown to be erroneous, he would have obtained similar relief from such further error. As this was not done, the judgment rendered and affirmed must stand. It cannot be attacked directly or collaterally in another court. Whether rendered against a party appearing in person or by an agent, the law makes no distinction as to the efficacy of the judgment. In either case it stands until annulled by the court which rendered it, or reversed on appeal. *Ita lex scripta*, and so has this court uniformly decided. Code of Pract. art. 606, &c. *Martin v. Martin*, 5 Mart. N. S. 151. *Lewis v. Lewis*, 5 La. 393. *Brent v. Cheevers*, 16 La. 25. *Ferrari v. Lambeth*, 11 La. 108. *Morgan & Co. v. Their Creditors*, 19 La. 85. *Broussard v. Bernard*, 7 La. 223. *Dunbar v. Thomas*, 14 La. 335. *Derbigny v. Pierce*, 18 La. 551. *Brosnahan v. Turner*, 16 La. 454. *Rhodes v. The Union Bank*, 7 Robinson.

But if this court, after having confirmed the judgment of the Probate Court, fixing the defendant's commissions, at the instance of the petitioner, through his counsel, Mr. Janin, were at liberty to disregard their own solemn judgment, to re-open the questions therein settled, and once more review the judgment of that court by which the commissions were originally fixed, the defendant would contend that the commissions were properly allowed.

Isaac Baldwin died in the year 1833, leaving a considerable estate.

His widow in community, sole executrix of his will and na-

tural tutrix of his only heir, Isaac Baldwin, then a minor, remained in possession of the entire estate. See the proceedings in the Probate Court.

A considerable portion of property belonging to the estate, to wit, a tract of land, &c., was subsequently adjudicated to her for \$30,000 (See the inventory, &c.); but no other division or separation of the estate was ever made, nor were the rights of the minor in any manner ascertained.

The widow died in the year 1836.

After the death of her husband, she acquired property in her own right, and may have been possessed of other property before and during her marriage.

She died in possession of the entire estate of the minor heir and her own. Her executors succeeded to the possession of the entire property—not to that of an undivided interest in the property. They had seisin of the whole estate; they inventoried the whole, and were responsible for the whole. The provisions of our Code on the subject of executors' commissions, are founded on the just principle, that their commissions should be commensurate with their responsibility. This is the clear language of articles 1676 and 1677 of the Civil Code. If then the executors had seisin of the whole, they are entitled to commissions on the whole.

That the executors in this case succeeded to the charge of the whole property, is certain. The tutor of the minor was not even sworn until after the account was filed. Neither the inventories, nor any other proceedings before the court, can enable it to say what property belonged to the heir and what to the succession. The accidental circumstance of one person being the heir of both persons, superseded the necessity of separating the interests, but did not relieve the executors from any portion of their responsibility.

The defendant abstains from any further discussion of this point, because the matter cannot be examined and enquired into here. The decision, allowing the defendant his commissions, made on the motion of the tutor's attorney, Mr. Janin, and subsequently confirmed, at his instance, by this court, forms

a bar to the present action. It has the force of the thing adjudged.

MARTIN, J.* The defendant and Thomas H. Maddox were executors of the mother of the plaintiff, a minor. Maddox was besides his testamentary tutor ; so was the defendant in case of the disability of Maddox. The executors, in the inventory of their testatrix' succession, included not only her portion in her deceased husband's estate as common in goods with him, but also the balance of it, constituting the share of his son, the present plaintiff, and charged their commissions, which ought to have been confined to their testatrix's estate, on that and the portion of her husband's property which had descended to his son, the plaintiff. Their account was homologated, and this double commission received.

On the plaintiff's coming of age and settling with his tutor, this error was discovered, and instantly rectified as far as it related to the latter, by his reimbursing the excess in the commissions received. The present defendant, however, persisted in retaining all he had got, and this suit was brought to compel him to refund what he had illegally charged and retained.

The defendant did not pretend to justify the charge he had made, but endeavored to repel the plaintiff's claim by the plea of *res judicata*, founded on the homologation of the executors' account ; and he is appellant from the decision of the first judge, overruling his plea on the ground that the heir cannot be affected by a claim of the executor, unless he be personally cited to contest it ; and that the tutor being interested, and indeed the plaintiff in the judgment pleaded as *res judicata*, the under-tutor ought to have been brought in to defend the minor.

The defendant's counsel has urged that the judgment of the Court of Probates, homologating the account of the executors, must avail the defendant, until it be set aside by an action of nullity, or reversed on appeal: We think the Parish Court did not err in concluding, that the heir cannot be affected by a claim of

* The opinion in this case was delivered on a re-hearing. GARLAND, J., did not sit on the trial, being absent by leave of the court.

the executor, unless he be personally cited to contest it (6 La. 222), and we concur with it in the opinion that the minor was not legally represented in a case in which the executors, one of whom was his tutor, claimed a large sum of money from the estate of his mother, for the tutor could not be therein plaintiff, to put part of the estate in his pocket, and defendant, as protector of the minor's rights, to resist his own claim.

It is incorrect to say that every judgment forms *res judicata*, until attacked by an appeal or an action of nullity. In the case of *Pysché v. Paradol* (6 La. 377), we were of opinion that a minor was not bound to resort to an appeal, or action of nullity, in order to protect himself against a judgment homologating the account of an executor, on the ground that she had not been legally represented before the Court of Probates homologating it. She had indeed been represented by a curator *ad hoc*, and she was relieved, because she ought to have been so by a tutor. It is difficult to distinguish that case from the present, in which, the tutor being interested against his ward, the under-tutor ought to have taken his place. In the case of *Vignaud v Bernard* (1 Mart. N. S. 1), this court held, that a judgment rendered against a person legally incapacitated to defend himself, ought to be considered as one rendered without parties, and absolutely void.

Executors are jointly and severally accountable for the property subject to the executorship. Civil Code, art. 1674. When, therefore, Maddox and the defendant sought to relieve themselves from the responsibility they had incurred by the acceptance of the executorship, they were bound to render an account thereof to the Court of Probates, contradictorily with some person whose interest it was to inquire into the legality of their charges. They made one of upwards of \$14,000 for their joint advantage. It would be absurd to say that one of them could legally admit one half of that charge, and contest the other. If it had been reduced, as it ought to have been, to one half, say \$7,000, each executor would have retained \$3,500. It is, therefore, clear that, with regard to that charge the minor was without protection, and the event has shown it. Maddox has acknowledged it, and honestly done justice to his ward. The

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defendant, or his attorney, could not successfully contend that the charge was a just one. He must be presumed to have known that the under-tutor was the only proper person to contest it. He is a member of the profession. From the situation of the property of the succession and his distant residence therefrom, it is very probable that the testatrix relied on him to see justice done to her son. Was he ignorant that he asked, and retained the property of another? If he was, why, as soon as his co-executor discovered the error, of which the defendant ought to have warned him, did he not follow the example before him, and instantly disgorge what he unjustly retained?

It is unnecessary that we should examine whether, in the defendant's claim for professional services, his co-executor could have represented the minor. As to it, the tutor was without any interest; for he was jointly and severally liable with the defendant, his co-executor, for any part of the succession retained by the latter, unless on a claim perfectly distinct from any thing relating to the executorship, contradictorily examined, and finally allowed by the court. But, be that as it may, in joint demands one of the creditors cannot represent the debtor.

BULLARD, J., *dissenting*. I do not fully concur in the opinion pronounced by a majority of the court in this case. The only question is, upon the plea of *res judicata* set up by the defendant. It appears to me, that Maddox had not such an interest in the amount of commissions coming to his co-executor, as to render him incompetent to represent Baldwin as his tutor, as he assumed to do. Not only did he assume to act as tutor in that case, but his attorney at law moved for the homologation of the account, with the exception of the charge for professional services, and it was so homologated, and the judgment in that respect was affirmed in this court. Neither of them appear to have been sensible at that time, of the error as to the amount of commissions. It is clear that the judgment in question, so far as it concerns the professional services of Carleton, has the force of *res judicata*, because Maddox represented Baldwin as his tutor; so that, according to the doctrine settled by a majority of the court, a judgment may be partly conclusive and partly not,

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if the person acting as tutor to one of the parties has an interest in the *question* though not in the *cause*. Such an interest in the question might render the tutor less vigilant, but it appears to me does not render him incompetent.

Judgment affirmed.

DANIEL TREADWELL WALDEN V. ISAAC PHILIPS.

Property, provisionally seized, having been released on the execution of a bond with security, plaintiff obtained judgment, and issued a *fi. fa.*, which was returned "no property found after demand of the parties." On a rule against the surety, to show cause why execution should not be issued against him, the latter introduced a witness who stated that he had notified plaintiff and the sheriff that the property originally seized was within the jurisdiction of the court, and requested him to seize it, informing him where it was. *Held*: That the rule should be made absolute.

APPEAL from the District Court of the First District, *Buchanan, J.*

W. D. Hennen and *Robinson*, for the plaintiff.

J. E. Jones, for the appellant.

MARTIN, J. The plaintiff having obtained a writ of provisional seizure on the property of the defendant, his lessee, the latter regained the possession of it on his bond, in which Reed joined him as his surety. The lessor having obtained judgment against the lessee, a writ of *fi. facias* was issued thereon, on which the sheriff returned no property to be found.

A rule was taken against Reed, the surety, to show cause why execution should not be issued against him, and he is appellant from a judgment making the rule absolute. It does not appear to us that the court erred. The record shows that the sheriff's return was made after demand of the parties. The appellant introduced a witness to prove, that his counsel called on the sheriff and the plaintiff, to inform them of the place where the property taken under the writ of provisional seizure and released on the bond was to be found, which place was within the jurisdiction of the court, and that the property was there as late as August, 1841.*

*This witness, McCarty, testified, that when, as counsel of defendant, he "found that an execution had issued against the property, he called on the sheriff's officer, and

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The court must have considered the return of the sheriff as conclusive of the fact that that officer had not been able to find any property. The witness states that he requested the plaintiff to issue an execution, informing him where the property provisionally seized could be found; and that after the execution was in the sheriff's hand, he gave the latter the same information. The return shows that, after demand made of the parties, that is of the lessor and lessee, and notwithstanding the information received from the appellant's witness, he could find no property. We are to presume that the lessor, on being called on by the sheriff, gave the information he was possessed of, because it was his duty and his interest to do so, and the contrary does not appear; and the evidence shows that the sheriff was in possession of the material fact communicated to the lessor. The plaintiff and appellee has failed during the pendency of this suit; and his assignee has been made a party in this court.

Judgment affirmed.

SUCCESSION OF HARDIN L. TILGHMAN—THOMAS O. TILGHMAN, Curator, Appellant.

The provision of art. 2256 that parol evidence shall not be admitted against or beyond the contents of written acts of transfer of immovables, was designed for the protection of contracting parties against each other. It does not apply where a partner claims from his co-partner a sum of money, alleged to have been privately and fraudulently received by him from a purchaser of partnership property as a part of the price, and offers the purchaser as a witness to prove the payment of the money, though not mentioned in the notarial act of sale signed by both partners and the purchaser. The testimony of the purchaser is admissible.

Art. 2622 of the Civil Code, which provides that one against whom a litigious right has been transferred, may release himself by paying to the transferee the real price of the transfer, with interest from its date, relates only to conventional assignments. It does not apply to a transfer resulting from a sheriff's sale under execution, the transferee acquiring all the rights of the owner of the right sold. C. P. 647, 690.

told him where the furniture first seized might be had; knows that the furniture was within the jurisdiction of the court as late as August last [the *fi*, *fa*. had been returned in July preceeding]; and that he called on plaintiff and requested him to issue a *fi. fa.*, stating where the furniture was."

Succession of H. L. Tilghman—T. O. Tilghman, Curator, Appellant.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. This action was instituted to obtain the settlement of a particular partnership, formed in October, 1837, between Wm. Barnes and the deceased, Hardin L. Tilghman, for the purpose of carrying on the business of storage, draying, and cotton-pressing. Barnes claims \$3,721 39, as a balance due him by the deceased, for debts of the firm he has paid since its dissolution, and for services he rendered to the partnership in performing duties assigned by the articles of copartnership to Hardin L. Tilghman, but which the deceased always neglected to perform. The answer denies the indebtedness of the estate; charges Barnes with divers acts of mal-administration and fraud; and avers that, on the 28th of September, 1838, only five months before the death of Tilghman, a balance sheet was struck of the situation of the partnership, from which it appeared that the firm was indebted to the deceased in the sum of \$2,755 38. The curator joins in the prayer for a settlement and liquidation of the partnership, and prays for judgment for such sum as may be found to be due to the estate of the deceased. The books, accounts, and matters in controversy were, by agreement, referred to auditors, whose report showed, in favor of Barnes, a balance of \$4,070 30. This report was opposed by the curator on various grounds, and the trial of the oppositions was progressing, when George Kirk intervened, averring that he had become the purchaser, at a judicial sale made by the sheriff of the Commercial Court, of the claim of Barnes, the plaintiff in this suit; and he prayed that such judgment be rendered in his favor as would have been given in favor of Wm. Barnes, whose right, title and interest in the premises were vested in him. To the petition of intervention, the curator specially pleaded, that George Kirk, having become the purchaser or transferee of a litigious right belonging to Wm. Barnes, for one hundred and seventy-five dollars, he had a right to tender and did tender to said intervenor the sum he had paid therefor, and he prayed that the suit be dismissed. The curator further averred, among other things, that on or about the month of July, 1839, Wm. Barnes did sell to one Samuel Chase, the un-

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expired lease of a cotton press at the corner of Gravier and Carondelet streets, which was the property of the partnership; that he induced the curator to join in the act of sale, and that although, from that instrument, it appears that nothing was paid by Samuel Chase, said Barnes privately received from him notes to the amount of \$2,000 for the transfer or sale of the said unexpired lease, all of which he put in his own pocket, and never accounted for; &c. After considering the report of the auditors, the oppositions made thereto, and the evidence adduced by the parties, the judge below gave a judgment in favor of George Kirk, the intervenor, for \$1,746 87, and the curator appealed.

This case has been submitted without any argument, oral or written. The appellant has not called our attention to any portion of the voluminous record before us, nor has he in any manner pointed out the grounds upon which he complains of the judgment rendered below. So far as our examination of the testimony and documentary evidence adduced has enabled us to understand the accounts and matters in dispute, we cannot say that the judge below has not come to a correct conclusion on the facts of the case; but we find in the record a bill of exceptions to the opinion of the judge below, excluding the testimony of Samuel Chase, offered to prove that, independent of the consideration expressed in a notarial act of sale of the lease of a cotton press, the joint property of the partnership, the said Samuel Chase had paid to Wm. Barnes the sum of \$2,000, as part of the price, or value of said lease. It appears to us that the judge erred. The proof offered did not tend to prove against, or beyond the contents of a written act, within the meaning and spirit of article 2256 of the Civil Code. The rule therein laid down is established for the security and protection of contracting parties, against each other. It could well be invoked by Chase if his vendors were to claim of him, and offered to prove by parol that he agreed to give \$2,000, over and above the consideration mentioned in the act of sale. But when, as is alleged in this case, one of two co-proprietors or partners, makes a bargain for the sale of the common property, and receives privately from the purchaser a sum of money which he

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does not mention in the sale, he commits a fraud upon his partner, and, when the latter claims his half of the amount thus received, and offers witnesses to prove the fact, he cannot claim the protection of the above rule. It proceeds upon the ground that both parties to a contract have an opportunity of explaining their agreements in it, and that when this is done, neither will be permitted, by testimony, to add to, or alter the stipulations it contains. When the curator signed the transfer, or sale of the unexpired term of the lease to Samuel Chase, he was unaware that any money had been or was to be received by Barnes, and could not protect himself by any stipulation in the act. As the proof then does not tend to increase or alter the obligations of the purchaser, and is not offered against him, but is intended only to show the receipt of a sum of money by Barnes, one half of which should be accounted for to the estate of his late partner, we think that it ought to have been admitted.

In relation to the plea and tender made by the curator in his answer to George Kirk's petition of intervention, the inferior court correctly held that article 2622 of the Code relates only to conventional assignments, and not to a transfer which results from a sheriff's sale under execution. Art. 647 of the Code of Practice authorizes the seizure of the rights and credits belonging to a debtor; and article 690 declares that the effect of the adjudication is to transfer to the purchaser all the rights and claims which the party in whose hands it was seized might have had to the thing sold. The purchaser, therefore, of the rights of Barnes in the present suit can exercise and enforce them in the same way, and to the same extent, as Barnes himself could. A similar decision was made by this court in *Early v. Black*, 12 La. 206.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that this case be remanded for a new trial, with instructions to the judge below to admit the testimony of Samuel Chase, or of any other witness to, prove the receipt by Wm. Barnes of the sum of \$2,000, alleged to have been paid to him as part of the consideration for the sale of the un-

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expired lease of the partnership; the appellee to pay the costs of this appeal.

Roselius, for the petitioner.

C. M. Jones, for the appellant.

DAVID MCGUIRE, for the use of James Noe, v. GEORGE ASBRIDGE.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *J. C. Clarke*, for the appellant.

Bartlette, curator of defendants' vacant succession, *contrá*.

SIMON, J. The plaintiff is appellant from a judgment which rejects a claim by him set up against the defendant for the sum of five hundred and fifty dollars, being the amount of three months' wages as pilot on board the steamboat *Pioneer*, during her voyage to and up the Sabine river, and thence to Galveston, Texas, from the 2d of January, to the 2d of April, 1843.

The defendant, sued as owner of the said steamboat, first pleaded an exception, which was subsequently withdrawn, and afterwards filed an answer, in which, after pleading the general issue, he alleged that the plaintiff was incompetent as a pilot, and had injured him to the amount of \$500.

The right of the plaintiff to recover depending mainly upon his capacity or competency to fulfill the duties of pilot for the purposes for which he was employed, the question here presented is one merely of fact, and our only enquiry is whether the judge *a quo* erred in finding that, from the evidence, the plaintiff is not entitled to recover?

It appears that, in the beginning of January, 1843, the defendant was induced to send his boat round to the Sabine, in consequence of the representations made by the plaintiff to the captain, that he was well acquainted with the navigation of said river, that the *Pioneer* was well suited to that trade, and on the recommendation of one Shannon. The boat commenced her trip in the middle of January, with the plaintiff as pilot on board, and with a sea pilot, and reached the Sabine lake on the 27th of the

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same month. The evidence shows that there are three passes from the lake into the river, to wit, the *eastern*, *middle*, and *western* pass. The plaintiff had told the captain in New Orleans, that he knew the channel as well as any man living; that *if he could not bring the boat over the bar, no man could do it*; and when there, plaintiff mistook the right and proper pass, and attempted to enter the middle one, which was the cause of the boat's grounding and remaining there several days. The captain was informed afterwards that the western pass had deep water; and as he had then some words with the plaintiff for bringing the boat to a place he did not know, the latter answered that *he did not want any thing, and that all he wanted was to get home*. In the mean time, on the 3d of February, the boat went through the western pass with less water in the lake than on the day of its arrival. She went up the Sabine; was much detained for cargo; returned with 279 bales of cotton to Sabine city about the middle of March; and from divers circumstances, detailed by the evidence, the boat was taken round to Galveston, where she was libelled by the crew and by the plaintiff; and, under the pretence that she was in danger of perishing by worms, and to save expense, she was sold, and became a total loss to the defendant.

We have attentively examined the testimony, and we are not prepared to say that it is insufficient to support the defence. It shows that, although the plaintiff is well able to manage a boat, he was entirely incompetent to act as a pilot on the Sabine river; that the trip was undertaken principally upon his representations that the boat was a proper one for that trade, and that he was well acquainted with that navigation, and competent to conduct the boat on the enterprise; but those representations appear to be contradicted by the evidence, and it is proved satisfactorily that he had not a sufficient knowledge of the localities to take the boat into the Sabine. We think he was the principal cause of the defendant's misfortune, and we concur with the judge *a quo* in the opinion, that the latter has already suffered too much in the loss of his property, to be subjected to paying an unjust demand.

Judgment affirmed.

Bank of Tennessee v. McKeage. Planters' Bank of Tennessee v. McKeage.

THE BANK OF TENNESSEE v. JOHN McKEAGE.

THE SAME v. THE SAME.

THE PLANTERS BANK OF TENNESSEE v. THE SAME.

Where one person furnishes the funds to purchase an article, and another his credit, skill, and industry in preparing it for sale, in order that a profit may be made for their mutual benefit, it will constitute a partnership.

Whoever shares in the profits of a partnership is a partner, and as such responsible for its debts, though his name be not in the firm.

Partnership property is liable to the creditors of the partnership in preference to those of the individual partner. C. C. 2794.

The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, or attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Peyton* and *I. W. Smith*, for the appellants.

C. M. Jones, for the defendant and intervenors.

GARLAND, J. These suits were instituted against McKeage, as the endorser of three bills of exchange and a promissory note, with a demand for interest and damages. Two hundred and six hogsheads of tobacco, called *strips*, were attached as the property of the defendant, he being a non-resident. The intervenors, who are merchants in Richmond, Virginia, claim the property as belonging to them, and the principal questions before us arise out of this claim.

The first suit is on two bills of exchange, drawn by Galbraith, Cromwell & Co., at Clarksville, Tennessee, on Galbraith, Logan & Co., New Orleans, endorsed by McKeage, amounting to \$11,000. The second is on a bill drawn by and on the same parties, for \$7,500; and the third is on a promissory note, drawn by R. W. Galbraith and Thompson Greenfield, also endorsed by the defendant; all of which bills, and the note, have been protested for non-payment.

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The facts of the case, as we have been able to extract them from a record of nearly 800 pages (three-fourths of which is made up of irrelevant matter), are, that the drawers of the bills and note were merchants in Tennessee, and, to raise money, obtained the endorsement of the defendant on their paper, which was discounted by the banks now suing on it. No question has been raised in the argument as to the liability of McKeage on his endorsements. A judgment was first rendered in favor of the plaintiffs and against the intervenors; but a new trial was granted, and, on a second trial and further evidence, a non suit was entered against the plaintiffs, on the ground that the tobacco attached belonged to the intervenors, and consequently the defendant was not legally before the court, never having appeared personally or by an authorized attorney. The defendant has for a number of years been established at Clarks-ville, where he has an extensive tobacco *stemmery*, a residence, and a number of slaves engaged in carrying on his business, which is the purchasing of tobacco in that section of the country, stemming, or making strips of such as is suitable for that purpose, and selling again in the leaf such as is not fit for that purpose. The intervenors are large purchasers and shippers of tobacco and cotton, transacting their business in Tennessee through the defendant, and the Messrs. Atkinson, and in New Orleans through other agents. For sometime previous to 1838, they remitted money to the defendant, to purchase tobacco for them, which he stemmed and put into hogsheads, and sent to New Orleans, to their agents, for which he was paid a certain compensation, having no interest in the property or speculations at all. In that year the intervenors proposed to the defendant to proceed as theretofore, but he declined doing so, alleging as a reason, the difficulty of keeping the interests and affairs of the intervenors separate from his own; he being engaged in purchasing, stemming, and selling tobacco on his own account. It was then agreed between them, that Kerr, Caskie & Co. should furnish the defendant with what amount of funds he should want, and he was to buy tobacco, stem it, and prepare it for market, and the parties were to share the profits and losses. At the end of every year an account was to be made up of their transactions, and the profits divided. The letter of the in-

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tervenors to the defendant, of October 18th, 1830, after speaking of the probable extent of the crop, the prices, and the probability of profits, proceeds: "We observe that you decline to put up the 150 hogsheads for us, which we proposed, but we are quite willing that you should take an interest in all that you stem, provided you consent to send round here (meaning to Richmond) the first 150 hogsheads, and allow us to send this lot to Bristol. It is necessary for us, to make up an assorted cargo for that market, and as there is every probability that as good, if not better prices, will be obtained there, than at Liverpool, we suppose you will feel no objection to this course. Should such an arrangement be agreeable to you, we are willing that you should put up, on joint account, such quantity as circumstances may render advisable, and you can do conveniently to good advantage; and you can take either a third or a half interest, as you choose, though, as the cost this year will be high, and the probable profit small, we think it likely that one third will be as much as you will care about risking." To this proposition McKeage assented, taking one half interest; and the parties acted on it up to the time of the seizure in this case. The intervenors furnished the funds to purchase tobacco, some years amounting to seventy-five or eighty thousand dollars. The funds were put into the hands of McKeage, by his drawing bills and drafts on the intervenors, and having them discounted by the banks in Tennessee, or by individuals, or by their sending him bills and checks drawn on other places, which he disposed of in Tennessee. A large number of those bills and drafts are in the record; others are not produced, as the drawers are supposed to have them; but regular accounts current are produced, showing the funds furnished. They show that the intervenors charged the defendant with the money furnished to him, and when the tobacco was sold and account of sales rendered, they credited him with the proceeds, and the profits were divided.

Roche, a witness for the plaintiffs, says that "McKeage has been, ever since he resided in Clarksville, engaged in stemming tobacco, and that, for a short time during the year 1839, he was a partner of Galbraith, Williams & Co., dry-goods, forwarding, and commission merchants, which firm sold out to Galbraith, Cromwell & Co. and Galbraith, Logan & Co. I never doubted Mc-

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Keage's ownership of the tobacco, as he had uniformly bought tobacco in his own name, shipped it in his own name, insured it in his own name, drew bills and notes in his own name, and endorsed in his own name; and he never made it public that he was doing business for another person." Wisdom, who as well as Roche, is an officer in the bank, says "McKeage was looked to, and relied on as a responsible endorser, and good for the amount of the bills. He was an extensive tobacco dealer, and had a large quantity of property in his possession, and was considered a good, responsible man; which property was believed to be his own. He transacted business in his own name, was engaged in buying and stemming tobacco, and shipping it. His transactions were in Clarksville and the surrounding country, among the planters. His credit was never questioned, and might be considered unlimited." Beaumont says, he is intimately acquainted with McKeage. His credit and standing was of the first order. At the time "he transacted business in his own name, purchasing, stemming, and shipping tobacco. His purchases were made in Clarksville and the surrounding country, and to a large amount, say, from fifty to sixty thousand dollars, or more, per annum. His credit was unbounded. He has resided in Clarksville since 1831 or 1832. He owns his residence, the tobacco-stemmer buildings, the ground attached to each, some twenty negroes, besides personal property. In addition to stemming tobacco, he was for a time engaged in merchandising. The firm was Galbraith, Williams & Co. He bought the tobacco here, in his own name. It was marked in his own name, and by him shipped. Some years ago McKeage informed me, that he had found it very difficult to keep the business of Kerr, Caskie & Co., and his individual business, separate, and that, therefore, he had determined to do no further business for them, unless the whole should be on joint account with them. He subsequently informed me that Kerr, Caskie & Co. had agreed to the same, and that they had an interest in all the business he did; and I have heard nothing to the contrary, until these suits were commenced."

Crouch says, he was an agent for McKeage. He purchased tobacco for him, and marked the hogsheads J. McK. Other

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witnesses swear to similar statements as Roche, Wisdom, and Beaumont. Some knew, or had heard, of the connection between the defendant and the intervenors in business; others had not such information. The statements of these witnesses embody the leading facts as to McKeage's proceedings in Tennessee. His credit was much relied on when the bills and notes were discounted. One witness says, but for his name, the bills would not have passed the exchange committee of the bank.

In 1836, the house of A. L. Addison & Co. was established in New Orleans, and they were immediately constituted the confidential agents and correspondents of the intervenors, and McKeage was directed by them to consign to that firm all the tobacco which belonged to them, or in which they had an interest, which he did; and we find him always afterwards in constant correspondence with those agents, consigning tobacco strips, and tobacco in the leaf, and stems, for the intervenors.

A. L. Addison, a member of the New Orleans firm, had been a member of the firm of Kerr, Caskie & Co., and understood their arrangement with McKeage, and the connection between them. He testifies, as does McMurdo, another partner, that since the early part of the year 1837, to the commencement of these suits, the defendant has been shipping tobacco to A. L. Addison & Co., on account of Kerr, Caskie & Co. The witnesses say, they obeyed the orders of the intervenors in selling or disposing of the tobacco sent by McKeage. When tobacco was sold, the account of sales were made out in the name of and rendered to the intervenors. They always paid the costs and charges when tobacco was shipped to other ports, and it was always in their name. Sometimes the defendant sent tobacco on his own account, and then accounts of sales were rendered to him; but when he did send on his own account, he generally wrote to that effect. Of the tobacco attached nearly all was to be sent to England, on account of the intervenors. The agents, correspondents, or a partner of the intervenors, in England, sent their accounts to the house in Richmond, where McKeage's account was credited and settled. The tobacco attached was received on account of the intervenors.

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In relation to the tobacco attached and in contest, it appears that on the 16th of April, 1842, McKeage wrote to Addison & Co., from Clarksville, saying that, on that day he had shipped 135 hogsheads of strips, and 12 hogsheads of leaf tobacco to them. That on the 4th of the same month he had written them directing an open policy to be taken, to cover 500 hogsheads of strips and 175 hogsheads of leaf tobacco. He says: "You will please take the insurance in the name of Kerr, Caskie & Co., and hold the strips subject to their order. The leaf you will sell to the best advantage, and place proceeds to their credit." A portion of the tobacco so shipped is in contest. A policy was taken out in the name of the intervenors, as directed, for \$87,500, to cover the shipments. On the 6th of May, 1842, the defendant made another shipment of 88 hogsheads of strips. His letter, informing Addison & Co. of it, only states that so many hogsheads have been shipped by the steamer West Tennessee, requesting that they be stored in a dry warehouse, and that the leaf tobacco may be sold. The bills of lading state that both shipments had been made by McKeage, and consigned to Addison & Co. The hogsheads had the defendant's usual marks, and, on the 13th of May, 206 hogsheads, out of the two shipments, were seized. A great many other hogsheads were subsequently shipped, but none seized. As soon as the intervenors were informed of the attachment, they wrote to their agents, and their letter is admitted in evidence, without objection, in which they claim the tobacco, and say: "By our agreement with Mr. McKeage, we are to furnish all the funds necessary to purchase the tobacco and to put up the strips, and are to have the entire control over the whole, directing the shipments and controlling the proceeds. The profit or loss upon the operation to be equally divided between us." The defendant, in a letter also admitted without objection, says the same thing.

McMurdo says, that all the tobacco received from the 16th of April to the 15th of July, 1842, from McKeage, was for account of the intervenors. A part of it was seized in the warehouse, and a part on the levée; but the evidence satisfies us that the bills of lading had been received by Addison & Co. before the attachment was levied.

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The greatest difficulty we have had in this case is to condense and state all the material facts of it. In our opinion they establish one of two positions, either of which is fatal to the plaintiffs. They prove an absolute ownership in the intervenors, or a partnership, for the purpose of buying, manufacturing, and selling tobacco, for the mutual profit of the parties. If the tobacco belonged absolutely to the intervenors, it is an end of the question; but we are of opinion that it belonged to them and the defendant, as partners. The intervenors furnished the funds to purchase tobacco, and the defendant his property, credit, skill, and industry, in preparing it for sale, so that profit might be made for their mutual benefit. This is a species of partnership well known to our laws, and those of every commercial country. Civil Code, arts. 2780, 2781. It is not necessary to, nor of the essence of, a commercial partnership, that it should contain the name of each partner (11 Mart. 331); and he who shares in the profits of a partnership is responsible for its debts, although his name be not in the firm. 5 La. 409. 7 Ib. 435. Silent partners are recognised by our law, and their rights and responsibilities protected and defined. 6 Mart. N. S. 49. Our Code, article 2794, says, that the partnership property is liable to the creditors of the partnership in preference to those of the individual partner, but the share of any partner may, in due course of law, be seized and sold, to satisfy his individual creditors, subject to the debts of the partnership, and such seizure operates a dissolution of the firm. 11 La. 262. The creditors of a firm are entitled to be paid by preference out of the partnership effects, over the creditors of an individual partner. 12 La. 370. From these well established principles, it results, that the interest of a partner in a particular thing, or piece of property belonging to the firm, cannot be seized or attached for his individual debt. An individual creditor cannot, under an execution, or attachment, have the half or third of a piece of goods, or other article belonging to a partnership, seized. He must have the whole share or interest of the indebted partner seized, and thus dissolve the partnership, and take the share, after payment of the partnership debts. There is a community of interest in the property as well as in the profits, and neither is separately liable

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to seizure. The interest of a partner in the firm is a distinct thing, and must be taken as a whole.

In the argument of this case it was attempted to be shown, that the bills and note sued on were discounted for the use and benefit of McKeage, and the money probably used in purchasing the tobacco seized, or some other bought for the benefit of the defendant and intervenors, and were, therefore, partnership debts. In this, we think, the plaintiffs have failed. The note on which the Planters' Bank has sued, says, on its face, that it is for the benefit of the drawers; and the testimony in the case satisfies us, that the proceeds of the bills, or drafts, went to the credit of Galbraith, Cromwell & Co., the drawers. If the proceeds had gone to the credit of McKeage, it would have been very easy for the plaintiffs to prove it. They discounted the bills, and knew perfectly well who received the proceeds. The cashier of each bank was examined, and some of the clerks; and none of them pretend that the defendant received the money.

The counsel for the plaintiffs zealously urged that, in consequence of the manner in which McKeage transacted his business in Tennessee, and the fact of all the tobacco being purchased, marked, and shipped, in his own name, it therefore belonged to him. These facts are unquestionably strong presumptions of the property being his, but like all other presumptions, they must yield to evidence which destroys them. It was well known to different persons, that a connection, in the tobacco business, did exist between the defendant and the intervenors. Other persons say that they did not know it; but that it was a matter of notoriety that McKeage was in the habit of drawing bills and drafts on the intervenors, for large amounts, and that they frequently sent him checks and bills, all of which were sold at a premium, or discounted, and money raised to purchase tobacco. No doubt, many of those bills and checks passed through these two banks. These remittances, amounting to from sixty to eighty thousand dollars annually, were continued year after year, were well known, and it is proved that the defendant's credit was unbounded, in consequence of his relations in business with the intervenors. He purchased tobacco large-

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ly, with the funds so received; and yet the witnesses say that they never heard, or suspected otherwise, than that the defendant was making all those purchases on his own account. The counsel tell us that these were advances made by the intervenors, not to be invested for their own benefit, or the mutual benefit of both, but solely for the profit of McKeage. If it were so, it would prove the intervenors to be very disinterested persons. We are not so credulous as to believe that they did, for a series of years, annually advance thousands of dollars to McKeage, without any benefit to themselves. The evidence satisfies us that a partnership, not of an unusual character, existed between the parties, and that the property attached belonged to them in that capacity.

We are of opinion that the court did not err, in refusing the application of the plaintiffs for a new trial, on the ground of other evidence having been discovered. The alleged evidence is a trust deed, made by McKeage, for the benefit of the intervenors, to secure them, in case this suit and another in Richmond, should be decided against them. This deed, so far from proving that the intervenors are responsible personally to the plaintiffs, or their property liable to attachment, goes to prove that McKeage did not consider or hold them answerable, and has endeavored to secure them from loss, in case it should turn out, that his friends and partners had become involved for his personal engagements, in consequence of his management of their mutual interests. The decision of this case in favor of the intervenors, releases the property in Tennessee of the lien on it, and gives the plaintiffs an opportunity of seizing it, when they shall obtain a right to do so, by judgment or otherwise.

Judgment affirmed.

Keaghey v. Barnes.

ROBERT KEAGHEY v. WILLIAM BARNES.

One employed to superintend draymen, and to keep the accounts and make out the bills of his employer, is neither a *workman*, *laborer*, nor *servant*, within the meaning of art. 3499 of the Civil Code. The word *servant* in that article means a menial servant. The prescription applicable to the claim of one employed as such superintendent or clerk, is that of three years, established by art. 3503.

APPEAL from the Commercial Court of New Orleans, *Watts, J. W. S. Upton*, for the plaintiff.

Larue, for the appellant.

MARTIN, J. The plaintiff claims from the defendant wages, as his clerk, during 27 months. The general issue, and the prescription of one year, were pleaded. The services were proven, and judgment was given accordingly; but it is silent as to the plea of prescription.

The defendant kept a considerable number of drays, and the plaintiff's employment was to superintend the draymen, to keep the defendant's accounts, and to make out all his bills; and he was to receive \$35 per month.

The prescription invoked is that of workmen, laborers, and servants. Civil Code, art. 3499. The plaintiff was neither a workman, nor a laborer. The word servant is *nomen generalissimum*, and in this article of the Code it must be confined to menial servants, otherwise it would extend to every one employed by another. We consider that the prescription available for the defendant in this case, if any there be, is that of three years (Civil Code, art. 3503), which may be invoked against the claims of overseers, clerks, secretaries, &c. This prescription has not been pleaded in this case; and, had it been, the lapse of time is insufficient.

Judgment affirmed.

Laughlin and others v. Ganahl.

WILLIAM LAUGHLIN and others v. LOUIS GANAHL.

Plaintiffs having sold to defendant a quantity of cotton, delivered it to him on receiving only a part of the price. The purchaser shipped the cotton, consigning it to a house of which the intervenor was a member, for sale on account of the shipper; and, in consequence of advances made by the intervenor, had the bill of lading made out in the name of the latter. Plaintiffs having sued to recover the balance of the price, sequestered the cotton; and the party who had made the advances intervened, claiming a privilege on its proceeds. *Held*, that by delivering the cotton before payment in full, the vendors authorized defendant to consider himself its absolute owner; that by suffering the intervenor to take the bill of lading in his name, defendant gave him the same right to the cotton from the date of the bill, as if he had endorsed to him a bill of lading filled up in defendant's own name, which would transfer the property; that the privilege of the vendor, under art. 3194 of the Civil Code, exists only so long as the property remains in possession of the purchaser; and that under art. 3214 of the Civil Code, the intervenor was entitled to a privilege on the proceeds of the cotton, for the advances made by him.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. This suit was brought to recover \$758 80, a balance due to the petitioners on a sale to the defendant of one hundred and two bales of cotton, for the sum of \$2,358 80, but of which only \$1,600 have been paid. They allege that the purchaser had shipped the cotton on board of the *Charles Carroll*, which was about being cleared; that they apprehended he would part with, or dispose of the same, during the pendency of the suit; and that to secure their privilege as vendors, they had the cotton sequestered on the 26th of April, 1844. On the following day the defendant moved the court to bond the property, but having absconded a few days after, counsel were appointed to represent him, who pleaded on his behalf the general issue. Auguste Nottebohm intervened, claiming a lien on the cotton sequestered, and the right to be paid out of its proceeds, in preference to the plaintiffs, the sum of \$7,700, for advances by him made to L. Ganahl, on this and other cottons shipped by him on board of the *Charles Carroll*; the invoices of said cotton, consigned to the commercial firm of the intervenor, Nottebohm Brothers, at Antwerp, for sale, and returns on account of said Ganahl having been furnished to the intervenor, and the bills of

lading for the same having been taken in his name, as the shipper. The intervenor specially charges, that if the plaintiffs ever had any legal or privileged claim on the cotton sequestered, they waived or abandoned it by delivering the cotton to the defendant, Ganahl, with whom he treated in good faith, finding the said Ganahl in the legal possession and ownership of the same, &c. There was a judgment below, dismissing the intervention, and allowing to the plaintiffs the amount they claimed, with the vendor's privilege on the property sequestered. From this judgment the intervenor appealed.

The evidence shows that, on the 23d of April, 1844, the petitioners delivered to Ganahl, 102 bales of cotton, previously sold to him for \$2,358 80, on account of which he paid \$1,600, leaving due the balance now claimed. The broker testifies that the 23d of April was not the day of the sale, but that the account was made out on that day, as soon as the cotton was weighed at the press, and that on the same day it was transferred on the books of the press to the credit or account of Ganahl. This is confirmed by the the book-keeper of the press, and other witnesses. On the next day, the 24th, Ganahl gave an order to the press to send the 102 bales on board the ship Charles Carrol. The intervenor exhibits two invoices, one dated the 20th April, 1844, for 222 bales of cotton, and the other dated the 22d April, for 102 bales, shipped by Ganahl on board of the Charles Carrol, bound to Antwerp, and consigned to Messrs. Nottebohm Brothers, for sale, and returns on account of the shipper. The cotton described in the second of these invoices corresponds in numbers and marks with that mentioned in the order of Ganahl to the press, and with that sequestered by the plaintiffs. He further produces two bills of lading, taken in his own name, as shipper; one bearing date the 20th of April, for 222 bales, and the other dated the 25th of April, for 102 bales. These bills of lading are shown to have been made out for the cotton mentioned in the invoices, and to have been filled up in the name of the intervenor, by the defendant's clerk, or by his order. The petition of intervention claims a sum of \$7,700, but does not distinguish between the advances made on the cotton sequestered, and those made on other cottons shipped on board of the Charles

Carrol ; but this is, we think, clearly shown by the receipts and checks produced in proof of such advances. There are three checks and three receipts. They show that \$5,600 were advanced on the 20th of April, on the lot of 222 bales, and that \$500 were advanced on that of 102 bales, on the 24th of April, and a further sum of \$1,600 on the 26th of April. Boot, the defendant's clerk, testifies that the checks, which are proved to have been paid, were given for the cottons comprised in the two invoices, and are the same for which the receipts were executed. The cotton described in the invoice of the 22d of April, and in the bill of lading of the 25th, so corresponds in marks, numbers, and weights, with the cotton sequestered, as to leave no doubt in our minds as to its identity ; and we are satisfied, from the evidence, that the intervenor has advanced upon it \$2,100. For this advance, he claims a privilege, under article 3214 of the Civil Code. " Every consignee or commission agent," says this article, " who has made advances on goods consigned to him, or placed in his hands to be sold on account of the consignee, has a privilege for the amount of these advances, with interest and charges, on the value of the goods, if they are at his disposal, in his stores, or in a public warehouse, or if, before their arrival, he can show by a bill of lading, or letter of advice, that they have been dispatched to him." It is urged by the appellees' counsel, that the intervenor's claims does not come within the purview of this article, which, from its words, he says, is clearly inapplicable to a case like the present. We think otherwise. The cotton was placed in the hands of the intervenor by the defendant, to be sold at Antwerp, by his commercial firm there. He undertook to be the defendant's factor, or commission agent, for the shipment and sale of this cotton. Having made advances on it, he has acquired the same lien for such advances as would belong to a consignee, or commission merchant, receiving goods from abroad, or bills of lading, and making advances on them. The case of the intervenor is even stronger than that of such a consignee, for he has both the actual and constructive possession spoken of in this article. The ship, on board of which the cotton was placed, was under his control, as freighter, and he held the bill of lading, which was

the legal title to the property. Defendant could not have demanded a surrender of it, without reimbursing the sums received and all incidental charges. By suffering the intervenor to take the bill of lading in his name, as shipper, Ganahl gave him the same right to the cotton as if he had endorsed to him a bill of lading, filled up in his own name; such an endorsement transfers the property, and is evidence of possession. 3 Kent's Commentaries, p. 207. 2 Starkie, p. 307. Abbott on Shipping, p. 244. But it is urged that the bill of lading, being an act under private signature, has no date against third persons, and that there is no proof in the record of its execution at its date. Documents of this kind are never drawn up otherwise than under private signature. The circumstances of this case, in the absence of any allegation, or appearance of fraud or collusion, sufficiently establish, we think, that the bill of lading was executed at the date which it bears on its face, to wit, the 25th of April. The cotton was ordered by Ganahl to be sent on board on the 24th. The witnesses say that the bill of lading was made out after the cotton was put on board; and the check for the last and largest advance on it was drawn and paid on the 26th. It is improbable that the intervenor would have given this check without receiving an instrument so necessary for his security; nor is it probable that the ship was to be cleared on the 26th of April, as alleged in the petition, if the papers and documents relating to the cargo on board of her had not been made out and put in proper order. By delivering this cotton into the possession of Ganahl, before he had paid the price in full, the plaintiffs authorized others to consider him as the absolute owner of it. The intervenor accordingly made advances on it, and, in the usual course of business, took a bill of lading in his name, and shipped it to his correspondents at Antwerp. The privilege accorded to the vendor, by article 3194, subsists only so long as the property sold remains in the possession of the purchaser; it is clear, in this case, that he had lost the control and possession of it. 7 Mart. N. S. 483.

The account of sales of the cotton sequestered, and afterwards bonded by the intervenor, was received by the latter before the trial of the case below. It was offered in evidence, and shows

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that the net proceeds obtained at Antwerp did not cover the claimant's advances on the cotton.

It is therefore ordered that the judgment of the District Court be reversed, so far as it allows to the plaintiffs a privilege on the property sequestered, and dismisses the intervention : and that there be a judgment for the intervenor, for the sum of two thousand one hundred dollars, with a privilege on the cotton sequestered in this case, with costs in both courts.

Cohen, for the plaintiff.

Van Dalson and *Goold*, for the absent defendant.

L. C. Duncan, for the appellant.

EZRA WILLIAMS v. CHARLES CLAIBORNE, Marshal of the City Court of New Orleans.

APPEAL by plaintiff from a judgment of the Parish Court of New Orleans, *Maurian J.*

Bartlette, for the appellant.

Greiner and *Roselius*, for the appellant.

MARTIN, J. The plaintiff is appellant from a judgment which rejects his claim against the defendant, the marshal of the City Court, for the illegal seizure of some furniture of his.

The furniture was originally sold by McCracken to Maria Rider, against whom he instituted a suit for the price, and procured a seizure under a writ of sequestration. The suit was terminated by a non-suit. The furniture not having been called for by Maria Rider, was still in the possession of the present defendant, as marshal, when a writ of *feri facias* was placed in his hands against Williams, on which the furniture was seized, and liberated by Williams paying the judgment on which the execution had issued. The present suit was brought for the illegal seizure of the furniture. The general issue was pleaded, and McCracken was cited by the defendant in warranty. He came in, and defended the suit.

The plaintiff and appellant contends that the first judge erred, because the evidence shows that he had purchased the furniture

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from Maria Rider, before defendant seized it under the writ of sequestration at the suit of McCracken, her vendor. The decision of this case depends upon the weight which is due to the testimony of Maria Rider, the only witness by whom the plaintiff attempted to prove his purchase of the furniture from her between the period of the sale by McCracken, and his exercise of the vendor's privilege by a sequestration. The first judge disregarded the testimony of that woman entirely. It was proved that she was of ill fame and was kept by the plaintiff, to whom she says she had sold the furniture in payment of money which she had borrowed from him. The furniture was first placed in an apartment which she occupied, and shortly before the seizure was removed to that of the plaintiff. When it was seized, it was found in a corner of that apartment, *in a bad condition, as if put there in a hurry, all upside down*. The plaintiff is a bachelor, and the testimony shows that the furniture is not suitable to his mode of living. The evidence of Maria Rider was also objectionable, on the score of the interest which she had to defeat her vendor in the exercise of his privilege. We have closely examined the whole evidence, and it has not appeared to us that it authorizes another conclusion than that at which the first judge arrived.

Judgment affirmed.

STEPHEN SMITH SELICK v. HANSON KELLY and others.

Under art. 275 of the Code of Practice, or under the 9th section of the act of 7th April, 1826, to obtain a sequestration, the applicant must make oath that he fears that the party having possession of the property may remove it beyond the limits of the State during the pendency of the suit. It is not any privilege or mortgage which the creditor has on the property, but the circumstance which causes him to apprehend that its removal may deprive him of his recourse upon it, that gives the right of sequestration. The requisites for obtaining a sequestration under the act of 1826, where the party has a lien or privilege on the property, are the same as under section 6 of art. 275 of the Code of Practice, in cases in which the creditor has a special mortgage.

Where a sequestration has been illegally issued, the true standard of damages is the probable loss sustained by the defendant in consequence of having been deprived of

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the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in, had the sequestration not been issued.

APPEAL from the District Court of the First District, *Buchanan, J.*

Frazer, for the plaintiff.

C. M. Jones, for the appellants.

SIMON, J. The defendants, sued upon a sequestration bond, are appellants from a judgment by which they are made liable to pay, *in solido*, to the plaintiff, the sum of fifty dollars, as damages sustained by the latter in consequence of the wrongful suing out of a writ of sequestration, issued at the suit of Hanson Kelly & Co. On the other hand, the plaintiff complains in his answer that the judgment appealed from is erroneous, in not allowing him damages to the full amount of the bond, and he prays that said judgment be so amended as to authorize him to recover of the appellants, *in solido*, the sum of eight hundred dollars.

This suit was instituted under the following circumstances: It appears that, on the 24th of March, 1842, Hanson Kelly & Co. filed their affidavit in the Commercial Court, in which they swear that the appellee and the steamboat *Angora*, of which he was owner, *were justly indebted to them in the sum of \$438 75, due for goods, stores, provisions and supplies furnished said steamer and for her use, for the payment of which they had a privilege on said boat, which they prayed might be sequestered.* Their bond was also filed with their affidavit, for the sum of eight hundred dollars, with Clymer, Britton & Swift, as sureties, conditioned as the law requires; whereupon a writ of sequestration was sued out, which, on the same day, was levied upon the steamer *Angora*, her machinery, furniture, &c., then about leaving New Orleans for Bayou Sara, with freight and passengers. She was permitted by the sheriff to proceed on her trip, on security being given for the return of the boat within four days. She was returned according to agreement and delivered to the sheriff, who took her in his possession, and kept her sequestered until the 11th of April following, when the appellee bonded her to release the sequestration. On the 12th of April, the boat was seized by the marshal of the United States District Court, and taken

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possession of by him, and, on the 23d of May, she was sold for \$595.

In the mean time, however, the proceedings went on in the original suit, and a motion having been made in the Commercial Court for a rule on the plaintiffs, to show cause why the sequestration should not be set aside, on the grounds filed, said rule was made absolute, on the 6th of April, 1842; and a judgment was rendered, on the 28th of the same month, in favor of the plaintiffs against the appellee, for the whole amount claimed in their petition. On the 27th of May, an execution was issued thereon, which, on the second Monday in July following, was returned, "No property found."

It is established by the testimony of divers witnesses that the steamer *Angora* was running from New Orleans to Bayou Sara, that she made weekly trips, and was doing a good business, by carrying freight and passengers. She was loaded, had her passengers on board, and was just about leaving the city, when she was sequestered. The steamer was taken by the sheriff across the river, and, in taking her across, they ran her on some spiles, and broke her guards through. This injury was done whilst she was in the possession of the sheriff. Since that time, plaintiff has not run any boat of his own in the Bayou Sara trade; and the first witness states that, from his knowledge of the receipts and expenses, the *Angora* was making from \$100 to \$200 a trip, over and above the expenses. He also states that when the boat was seized, she had a sufficient supply of kitchen utensils on board, and various articles of provision, worth at least \$50, which were all missing when she was taken across the river.

Another witness testifies that he was running a boat in that trade, doing a good business, and had stopped two or three weeks before the plaintiff's boat was seized. He gave his freight to plaintiff, and went up the river to solicit his friends to give their business to Capt. Sellick, and his, witness', average profit to Baton Rouge was between \$200 or \$300 every trip. He thinks plaintiff would have got all the business which he, witness, had. A third witness proves also the accident that happened to the boat when she was taken across the river; and thinks the injury done to plaintiff by the seizure of his boat was

considerable. He says that he attributed the accident to the negligence of those bringing her out, and that the Angora stood as high at the insurance office as any boat in the trade. The first witness being recalled, adds, that the seizure must have been an injury, and that he would not take \$5,000, to stop running in the summer, if he had the means to carry on.

A fourth witness declares that the plaintiff's business was broken up by the seizure of his boat, and that he has run no boat since. He would say that capt. Sellick has been damaged considerably by said seizure, and by being thrown out of business; that the business gets into other hands, and it is difficult to get it back again. The witness gives a statement of the circumstances relative to the absconding of plaintiff's clerk, a short time before the seizure, with \$1400 of the plaintiff's own money; and this was the cause of plaintiff's being behind in the payment of his bills. He says that if plaintiff had been in his debt at the time, this circumstance would have induced him to extend indulgence to him, rather than seize his boat. When a steamboat is once seized, all the creditors come in and seize also. The boat was purchased by the witness and plaintiff for \$8,000, and plaintiff became subsequently owner of the entire boat. This boat was the only means plaintiff had of supporting himself and family, and he was damaged at least \$2,000 by its being seized by defendants. The boat did not make any trip after the seizure; she was seized as she was going out, but went up that trip, and never ran afterwards.

- Two other witnesses state also, that when a boat is seized by one person, it is the cause of suits and seizures by all the other creditors. It is then useless to bond the boat, as security would be required for each creditor and in different courts.

With this evidence before him, the judge *a quo*, being of opinion that the sequestration had been illegally obtained, and that the defendants were bound to pay the damages which the plaintiff had sustained from its having been sued out, thought, that although it was shown that plaintiff was doing a very good business with his boat when it was seized, yet, as she was also seized by the United States marshal, the only damage which seemed to be proved as having been caused by the seizure at the

suit of the defendants, was the loss of certain stores and other articles amounting to \$50, missing from on board while the boat was in the hands of the sheriff; and he gave judgment accordingly.

It is perfectly clear that the sequestration complained of was illegally and improperly sued out. The claim of the defendants against the plaintiff was based upon a *right of privilege* which he had on the boat for the payment of the debt sued on; and the prayer of his petition is, that the judgment to be rendered be satisfied by privilege on said boat. This is also the purport of the affidavit upon which the writ of sequestration was ordered to be issued, and was issued, although nothing is said in the affidavit in relation to *the creditors apprehending that the boat would be removed out of the State before they could have the benefit of their privilege.*

Now, the 6th paragraph of art. 275 of the Code of Practice, requires, in positive terms, that such an oath should be taken by a creditor, by special mortgage, who seeks to exercise the power of sequestering the mortgaged property; and by the 9th section of an act of 1826 (B. & C.'s Dig. p. 774), it is provided, that *in addition to the cases mentioned in said article, the plaintiff may obtain a sequestration in all cases where he has a lien or privilege upon property, upon complying with the requisites of the law.* Thus, the right of sequestering property is extended to all sorts of liens or privileges which may exist upon it, so as to secure the exercise of such lien or privilege, when the creditor apprehends that the property may be removed out of the State; and as this court said, in the case of *Debailton v. Ponsony* (5 Mart. N. S. 42), we understand the requisites necessary to obtain the sequestration under the law of 1826, to be the same as those required for obtaining the writ on a special mortgage. It is not the privilege that gives the right of sequestering the property, but it is the circumstance which causes the creditor to apprehend that the removal of the property out of the State may deprive him of its exercise, that entitles him to this extraordinary remedy, so as to preserve the property during the pendency of the suit, and prevent its being removed before he can have the benefit of his privilege; and it is necessary that he should make oath to the

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facts which may have induced his apprehension. This oath was not taken in the original suit; the sequestration was properly set aside; and the judge *a quo* did not err in the view which he took of the law governing this case.

With regard to the question of damages, however, we cannot agree with him. The writ of sequestration, which is a very severe mode of proceeding, only to be resorted to as a remedy intended for extreme cases, and in those cases only specially pointed out by law, subjects the party who resorts to it, to pay such damages as the defendant may sustain, in case such sequestration should have been wrongfully obtained. It is true those damages ought not to be vindictive; but as this court said in the case of *Stetson et al. v. Leblanc et al.* (6 La. 271), the true standard should be the probable loss sustained in consequence of the party being deprived of the free use or disposal of his own property; and he should be placed as nearly as possible in the situation he would have been in if the sequestration had never been issued. Here, there was no cause whatever for the sequestration; and yet, the defendant was deprived of the use and enjoyment of his boat, which, as one of the witnesses says, was the only means he had to support himself and family. All the witnesses say that he was considerably injured by the seizure; that his business was broken up; that he lost considerable profits in a very important season of the year; and they generally estimate the damages which he may have sustained from this interruption in his trade, and even those which he did really sustain, at an amount *far above the claim* set up in the petition, under the sequestration bond. It is true the boat was subsequently seized by the United States marshal, after she had been only about fourteen days in the possession of the sheriff; but the injury was already done; the appellee's business was broken up; and it seems from the evidence, that the subsequent seizure was the necessary consequence of the harsh and severe remedy which the appellants had thought proper to resort to. Under such circumstances, and in the absence of any right in the appellants to issue the sequestration complained of, nay, of any evidence to show even the least probable cause or suspicion to justify their proceedings, we are satisfied that the

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plaintiff and appellee, having satisfactorily shown the loss by him sustained to be above the amount of the bond sued on, judgment ought to have been rendered below in his favor for the sum of eight hundred dollars, as a just compensation for the damages by him sustained.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that the plaintiff and appellee do recover of the defendants and appellants, *in solido*, the sum of eight hundred dollars, with legal interest per annum thereon, from the date of this decree until paid, with costs in both courts.

SAME CASE—APPLICATION FOR A RE-HEARING.

C. M. Jones, for a re-hearing. The court has decided that in all cases where a lien or privilege is claimed upon property, whether personal or otherwise, the party claiming that privilege and wishing to enforce it, as provided for by the amendment of the Code of Practice passed April, 1826, must make the affidavit required of those claiming a sequestration of property specially mortgaged to them, as provided for in the 6th section of art. 275 of the Code of Practice, thus putting property not susceptible of being mortgaged, upon the same footing with immovable property, although the five preceding sections of the same article, make a marked distinction between the affidavit necessary to obtain a sequestration of personal property, and property capable of being specially mortgaged. To support this decision the case of *Debaillon v. Ponsony*, 5 N. S. 43, decided in the Western District, in August, 1826, is solely relied on.

The correctness of that decision is not impugned, but it is inapplicable to the case now before the court; and the error which I think the court has fallen into, is, in not drawing the distinction between property capable of being mortgaged, and personal property.

There are but two species of property capable of being *specially mortgaged*, land with the growing crops thereon, and

slaves. There can be no other case in which an affidavit to sequester property, should comply with the requisites of the 6th section of article 275.

The case of *Debaillon v. Ponsony*, was one of these, and the affidavit in that case, must have been made previous to the amendment of April, 1826, for the suit was finally decided in August, 1826, too short a time for it to have been made after the passage of the act.

It appears that Ponsony was the tutor of Debaillon, appointed more than two years previous to the institution of the suit. He was, therefore, appointed under the old Civil Code, and his property was liable for his administration of the minors' estate, according to the provisions of the law as they then existed. Now by a reference to page 454, art. 15, of the old Civil Code, and to the case of *Winchester v. Thibodeaux' Ex'rs.* (8 La. 192), it appears there existed in favor of a minor, on all the property of his tutor, from the day of his appointment, a mortgage, or, in other words, that the property of the tutor was specially mortgaged for the faithfulness of his administration. This then was a case under the 6th section of art. 275, and the sequestration would have been maintained, even if the amendment of April, 1826, had never been passed. That such an affidavit should be required where slaves specially mortgaged are sought to be sequestered, is reasonable and just, for it would be hard indeed if the owner should be barred of the privilege of removing his slaves, before the debt became due, from one parish to another, because the party holding the mortgage or lien, in order to keep the slaves subject to the final decision of the court, can do so, by merely recording his mortgage in the parish to which the slave may be removed, and his mortgage being so recorded, no other creditor can deprive him of the lien and privilege which his special mortgage gives him, and this is the sole reason why the affidavit is required; but with personal property this lien or privilege can not be so preserved.

The Code of Practice enumerates six different cases in which the writ of sequestration may issue. Art. 276 says that an affidavit must be filed, setting forth the cause for which the order is claimed, and that bond and security must be given be-

fore the issuing of the sequestration. In these sections there is *but one* that requires that the affidavit must state the apprehension of the property being removed out of the State, and one that it will be removed out of the jurisdiction of the court; the other four require nothing more than the reasons for which the sequestration is required. This being the law, how can it be said that the act of 1826, which was passed for extending the cases in which a writ of sequestration might issue, should be so construed as to limit it, and, in some cases to destroy it altogether; and why is this 6th section thought so peculiarly applicable to the amendment of 1826, when it speaks merely of *property specially mortgaged*, and the other five sections refer to both personal and immovable property, and the act does not set forth any particular form of affidavit to be made.

The amendment of April, 1826, *extended* the right to sequester to all cases where there existed a lien, or privilege, upon a compliance with the requisitions of law, and in 1839 it was further extended to all cases where a party fears that the other will conceal, part with, or dispose of the moveable or slave in his possession, during the pendency of the suit, upon his complying with the requisitions of the law. The words "upon his complying with the requisitions of the law" are used in both amendments, and what they mean in one they must necessarily mean in the other. The court has decided that those words mean, that the affidavit must state the apprehension that the property sought to be sequestered is about to be removed out of the State. I conceive that no other construction can be put upon them than, that the cause for which the order is claimed should be set forth, and bond and security be given, as required by art. 276.

If the construction of the court be right, what would have been the effect between April, 1826, and the amendatory act of 1839, and what since?

A ship builder repairs, or builds a tow-boat or ferry-boat which never leaves the State, or even the jurisdiction of the court, yet he has a privilege on the boat for the price of his labor. Suppose, after the delivery of the boat and the lapse of sixty days, judgments are obtained, and executions about to be levied on the boat which would deprive him of his lien and

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privilege—what must he do? Of what avail would his privilege be to him, if denied the right of using it—if before it can be used he must make an affidavit, which would be false upon the face of it? Suppose that previous to the act of 1839, the owner of the boat was about to make a sale of her, what was the privileged creditor to do? He has a lien, and privilege by the act of April, 1826, but if he attempts to enforce that lien and privilege, and, by so doing breaks off the sale, he will have to pay damages for it. Instead of extending the benefits of the writ of sequestration, such a construction would utterly destroy it. Again: as the words "requisitions, of the law," used in the act of 1839, cannot, by any construction whatever, mean that the affidavit must be in conformity with the 6th section of art. 275, why should the same words be considered as having a different meaning when used in the act of 1826? See on this subject 1 Rob. 531.

A contractor to fill up a lot in the city of New Orleans has a privilege thereon (7 Mart. N. S. 17), but no special mortgage. Can it be pretended that, if he wishes to sequester, finding that the property is about to be sold, he must swear that the lot is about to be removed out of the State of Louisiana, and give his reasons for so believing?

The 6th section of article 275 applies solely to slaves, and to growing crops, and must be confined to them, and to them only.

In the case of *Prall v. Peet's Curator* (3 La. 274), where the property sequestered was in the hands of the sheriff, the court refused to set aside the sequestration, and declared it lawful under the amendment of April, 1826, giving a right to a writ of sequestration where there was a lien and privilege, although the affidavit did not state that the property was about to be removed out of the State, or even beyond the jurisdiction of the court, but merely stated the reasons why the sequestration was called for, the party having complied with the requisitions of the law, by giving bond and security. See the record in the Supreme Court, no history of the case being given in the report. In no case has such an affidavit been required, except where slaves and the growing crops are sought to be sequestered. See 5 La. 345. 14 La. 266, 351, 536.* 17 La. 211. In all of these cases, the rea-

son given for requiring such an affidavit was, that the property was mortgaged ; and now, since the act of 1839, even this is not required ; a party has but to swear, to obtain the sequestration, that the other will conceal, part with, or dispose of the slave or moveable in his possession during the pendency of the suit, and to comply with the requisitions of the law, that is, by giving bond and security. No possible case can now occur, in which it would be necessary, to obtain a sequestration, to make such an affidavit as is required by the 6th section of article 275, the amendments of 1839 covering every conceivable case.

Kelly & Co. had such a privilege or lien on the steamboat Angora, as is contemplated by the act of 1826. They state in their affidavit, that it was for the furnishing of supplies and necessities for the use of the boat, as required by article 276 of the Code of Practice, and on the trial of the case they proved the allegations of their affidavit to be true, and judgment was rendered in their favor with *privilege* on the steamer. That the judgment giving this privilege was correct is indisputable ; that they had a right to sequester the steamboat is equally so. The only point to be decided is, whether they were bound to make an affidavit, as required by the 6th section of the article 275 of the Code of Practice.

SIMON, J. The defendants' counsel, in his petition for a rehearing, urges that the case of *Debaillon v. Ponsony* (5 Mart. N. S. 43), to which reference is made in our judgment, is not at all applicable to the present ; and he says that our opinion is erroneous, and that the error we have fallen into, is, in not drawing the distinction between property capable of being mortgaged and personal property.

On referring to the affidavit taken by his client for obtaining a writ of sequestration against the steamboat Angora, we see that *the only cause* for which the order was claimed, is, that said steamer and owner are justly indebted to the applicants in the sum of \$438 75 due for goods, &c., *for the payment of which they have a privilege on said boat*, which they pray may be sequestered.

Now, by the terms of art. 276 of the Code of Practice, it is required that a plaintiff, who wishes to obtain an order of seques-

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tration, in any one of the cases above enumerated, must annex to his petition, *an affidavit setting forth the cause for which he claims such order, &c.*; and we have said in our judgment, that it is not the privilege that gives the right to sequester property, but the circumstance which prompts, or causes the creditor to apply for the writ, in order to preserve the property during the pendency of the action; and that such circumstance, or cause must be explicitly set forth in the affidavit.

By referring to art. 275, which contains the enumeration of the cases alluded to in art. 276, we find, that previous to the laws of 1826 and 1839, a writ of sequestration might be obtained in six different cases, and for six different causes. For instance: under sec. 2, when one sues for the possession of moveable property or of a slave, he may obtain the same to be sequestered, when he fears that the party having possession may ill treat the slave, or send either the slave, or the property in dispute out of the jurisdiction of the court, during the pendency of the suit. The latter part of this law, shows *the cause* that must be set forth in the affidavit of the applicant, and it is clear that the writ could not be ordered without showing the existence of such cause. Under sec. 6, a creditor *by special mortgage* has the power of sequestering the mortgaged property, when he apprehends that it will be removed out of the State before he can have the benefit of his mortgage, and will make oath to the facts which induce his apprehension; and it is obvious that the existence of the special mortgage shown by the oath of the party, would not, in such case, be a sufficient cause for obtaining the issuing of the writ. Thus, the right upon which the action is based, is clearly made distinct from the cause for which the property upon which it is to be exercised is sought to be sequestered; and we have said in our judgment that, as under the law of 1826, when a plaintiff has a lien or *privilege* upon property, he may obtain a writ of sequestration of such property, on complying with the requisites of the law, we thought that such requisites, on the authority of the case of *Debaillon v. Ponsony*, where the question was fully investigated *as to a general and tacit mortgage*, and not, as the counsel says, with regard to a special one, ought to be the same as those required for obtaining the order on a special mort-

gage. In the case cited, and said to be inapplicable, Debailion did not sue *as special mortgagee* ; he sued under the law of 1826, as having *a lien* on the property ; and, if a distinction is to be made between property capable of being mortgaged, and personal property, a distinction which is not made in the law, it seems to us that the legal requisites of sec. 6 of art. 275 would apply with greater force to personal property, which is more susceptible of being removed out of the State before the creditor can have the benefit of his privilege. The law of 1826, provides for two cases, *a lien* (such as a general mortgage), and *a privilege* ; and by a law of 1839, sec. 6 (Acts of 1839, p. 164), it is provided that, in addition to the cases mentioned in art. 275, *a sequestration may be ordered in all cases, when one party fears that the other will conceal, part with, or dispose of the moveable, or slave in his possession, during the pendency of the suit, on complying with the requisitions of the law.* Thus again, it is made necessary to show a circumstance, or fact beyond the simple right of action, to obtain the sequestration of the property. The cause for which the writ is claimed must be stated in the oath of the party who claims it ; and to say that a creditor, *on simply swearing to the existence of his privilege* on the property, without any cause, would be entitled to deprive his adversary of the use and possession of his property, and that, in all cases of alleged privilege, the oath of the party who seeks to enforce it, establishing that the right exists, without any other cause shown, would be sufficient to take the property from its legal owner at the very inception of the suit, would be too monstrous and preposterous a doctrine to be for a moment countenanced by us, or by any other tribunal. Here again, *no cause whatever* was shown, except the right of action. The Commercial Court and the District Court were both of opinion that the affidavit was insufficient ; and notwithstanding the attention we have bestowed on the counsel's reasons and authorities, on which we have been called on to grant a re-hearing, we have been unable, after the most mature deliberation and a thorough re-examination of the question, to come to any other conclusion. His client should have brought himself at least within the requisites of the law of 1839, if he could not do it according to the law of 1826,

in connexion, as it clearly is, with sec. 6 of art. 275; and not having done so, he had no right to claim the issuing of the writ, which, having been illegally sued out, was very properly set aside; and he must bear the consequences of his illegal act.

In the cases cited from 3 La. 274, 14 Ib. 266, 351 and 536, 17 Ib. 209, and 1 Rob. 531, in which the sufficiency of the affidavits was in question, this court invariably considered that it was necessary that a valid cause should be sworn to by the party applying for the writ, and that he should state the facts upon which such cause was founded, according to the laws governing the cases respectively. In the case of *Erwin v. Jones* (5 La. 344), it was held that the creditor is required to make oath of the facts which induce him to apply for the writ, and that such writ will not be issued where the affidavit states only that the plaintiff has *a lien* on the property in the defendant's hands. And in the case of the *Ohio Insurance Company v. Edmondson et al.* (5 La. 295), so much relied on as a case in point, and to the record of which we have been referred, the steamboat *Walter Scott* was sequestered, on the affidavit of the plaintiffs not simply that they had a privilege on the boat, but that *said boat was on the eve of leaving the jurisdiction of the court, and that said plaintiffs were apprehensive of losing the amount they claimed, should said boat depart previous to their demand being satisfied.* This was deemed to be sufficient, as a good and legal cause was shown, substantially amounting to that pointed out in art. 275, sec. 6, and the sequestration was maintained, although it had been prayed for in an amended or supplemental petition, referring to the original petition to which the affidavit was annexed.

In conclusion, let it be well understood that the party who prays for a writ of sequestration of his adversary's property, in order to preserve it during the pendency of the action and give effect to the suit which he has brought, or intends to institute against him, must bring himself within any one of the cases provided for by law; and that such writ, in its nature vexatious and extraordinary, ought not to be issued, unless, according to art. 276 of the Code of Practice, his affidavit sets forth the cause

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for which he claims the order, as pointed out by the laws applicable to such different cases respectively.

The re-hearing is, therefore, refused.

EDWARD G. HYDE v. WILLIAM T. HEPP.

Action to recover of defendant the value of certain carriages, consigned by plaintiff to a third person for sale, and sold under a *fi. fa.* by defendant, and purchased by him as the property of one of his debtors. The consignee, who resided in another State, having since died, plaintiff offered the clerk of the consignee as a witness. On an objection to his testimony, on the ground that his only knowledge of the matters of controversy, being derived from a correspondence between the plaintiff and consignee, not produced nor accounted for, was not the best evidence: *Held*, that his testimony was admissible, and that plaintiff cannot be supposed to have the means of procuring the books and papers of the deceased, nor the letters written to him.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

A. Hennen, for the plaintiff.

Lockett and Micou, for the appellant.

MARTIN, J. The plaintiff claims the value of two carriages of his, on which the present defendant caused a *fi. fa.* to be levied, and which were sold and purchased by him as the property of one of his debtors. The defendant pleaded the general issue, and averred that he bought the carriages on an execution from the Commercial Court. There was judgment against him, and he appealed.

Our attention is arrested by a bill of exceptions to the testimony of Avery, on the ground that his knowledge of the matter in controversy, being derived from correspondence between the plaintiff and one F. C. Rose, and that correspondence not being produced or accounted for, the testimony was secondary only, and not the best evidence. It does not appear to us that the court erred. The witness was a clerk of Rose, the person to whom the plaintiff had shipped the carriages to be sold on commission, and who is the defendant in the *fi. fa.* under which they were seized and sold. He is now dead. The witness derived his knowledge from the books and papers of the deceased, and the plaintiff's correspondence with him. The plaintiff was

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certainly entitled to his testimony, and cannot be supposed to have the means of procuring the books and papers of the deceased, who resided in the State of Mississippi, nor the letters he wrote to him.

The testimony of this witness is corroborated by others, whose depositions alone might have supported the plaintiff's case.

Judgment affirmed.

WILLIAM KRÆUTLER and another v. THE PRESIDENT, DIRECTORS
AND COMPANY OF THE BANK OF THE UNITED STATES.

The signature of the judge is required only to final judgments. C. P. 546. Other decrees or orders made in the course of a suit, may be entered on the minutes, and, where they may cause irreparable injury, may be appealed from, though not signed. C. P. 544.

A garnishee having answered the interrogatories propounded to him, took a rule on plaintiffs to show cause why he should not be allowed to file a supplemental answer. Plaintiffs, averring that the answer filed by the garnishee was evasive and insufficient and amounted to a judicial confession in their favor, and cannot be done away with by any subsequent answer; that measures have been taken to fix the liability of the garnishee, by obtaining an order directing him to deliver to the sheriff a transfer-warrant for certain shares of stock held by him for the defendants; and that the supplemental answer came too late, moved for a judgment against the garnishee for the amount claimed by them: The supplemental answer was allowed to be filed, and the motion for a judgment against the garnishee overruled, by an order entered on the minutes, but not signed. On appeal by plaintiffs: *Held*, that the appeal must be dismissed, the judgment being an interlocutory one, not producing irreparable injury.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Peyton and I. W. Smith*, for the appellants.
T. Slidell, contrâ.

GARLAND, J. This case arises out of the one in which an opinion has been given this morning, between the same plaintiffs and defendants.* Robert Copland was cited as a garnishee, and required to answer sundry interrogatories, the object of which was, to ascertain if he had, or had not, in his hands, any money, goods, chattels, or assets belonging to the bank, and if

* The case referred to is still suspended (November, 1845) by an application for a re-hearing

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so, how much, and particularly whether or not he had the sum of \$100,000, or a sufficient amount to pay the plaintiffs' debt.

In answer to the interrogatories, Copland stated that he had in his possession thirteen promissory notes, amounting to \$95,000, which were pledged to the Bank of the United States, to secure a debt due to the bank in Philadelphia, which debt had been settled, so far as these notes were concerned, previous to the attachment being notified to him. He further said, that he had in his possession a transfer warrant, from the transfer books in Philadelphia, for 925 shares of stock in the New Orleans Gas Light and Banking Company, in the name of W. W. Frazier, cashier, on which \$30 per share had been paid; also sundry certificates of stock in the Bank of Orleans, for 642 shares, on which \$50 per share had been paid; and certificates for 722 of Orleans Bank stock, on which \$50 per share had been paid, all standing in the name of John Andrews, first assistant cashier. *All which stock has been in like manner pledged as collateral security, for a debt due to said Bank of the United States in Philadelphia, where the original debt, and evidence thereof, is held.*

He further answered that, previous to this attachment being levied, another in favor of the United States had also been levied, and he notified as a garnishee, which was still pending and undecided. This answer was filed, May 27th, 1843. In December of that year, the cause was tried between the plaintiffs and defendants, and a judgment given for the former; none of the garnishees being present, nor any order made relating to them. This judgment decrees a "privilege on the property attached."

An execution was issued on the judgment so rendered, and the sheriff returned it into the clerk's office, stating that he had "seized all the money, property, credits and effects of the defendants in the hands of W. W. Frazier, C. Adams, Jr., and the Bank of Louisiana, and returned it by order of plaintiff's attorney."

In March, 1844, without any notice being given to Copland, or judgment against him in any form, the Commercial Court entered an order stating that, on motion of the attorney for the plaintiffs, and considering the judgment herein rendered, and the execution thereon issued, and also the answers of R. Copland to

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the interrogatories propounded to him, as garnishee, it is ordered that said Copland do forthwith deliver to the sheriff of the court the transfer warrant for 925 shares of stock in the New Orleans Gas Light and Banking Company, in the name of W. W. Frazier, cashier, it being the warrant described in the answers of said Copland to the interrogatories. The day after this order was entered on the minutes—for it is not signed—the sheriff called on Copland with it, and demanded the warrant, which he refused to deliver. About a week subsequently to this order, or decree, Copland asked for a rule on the plaintiffs, to show cause why he should not be permitted to file a supplement to his answer, which was left with the clerk, but is not in the record. The next day, the plaintiffs, for answer to this rule, averred :

1st. That the answer already filed by Copland, as garnishee, is vague, indefinite, insufficient, and evasive, and in law confesses the facts inquired of in the interrogatories, and amounts to a judicial confession in favor of the plaintiffs, and cannot be destroyed by any subsequent acts.

2d. That the plaintiffs had, prior to the taking of the rule, taken measures to fix the liability of Copland, as will appear by the order rendered on the 4th of March, 1844.

3d. That the amended answer comes too late, and cannot be filed.

On the same day that this answer was filed to Copland's rule, the counsel of the plaintiffs moved for judgment in their favor against the garnishee, for \$24,200, with interest and costs, on the grounds that said garnishee had, by reason of his answers filed, confessed that, at the time of service of the attachment upon him, he was indebted to the defendants in an amount greater than the judgment against them, and also had property to a greater amount, which he has, in contempt of the order of the court, refused to deliver ; but the court, stating that it was doubtful as to the extent of Copland's liability, ordered that he should have notice of the motion, and that the case be fixed for argument three days after. The counsel on both sides were heard, and, on the 29th of June, the supplemental answer of Copland was permitted to be filed, and the motion for a judg-

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ment against him overruled, and the plaintiff's rule discharged. From this order, entered on the minutes of the court, and not signed, the plaintiffs have appealed.

It is moved to dismiss this appeal, on two grounds: 1st. That the order, or decree, is not final, but interlocutory, and produces no irreparable injury. 2d. That the order, or decree, is not signed by the judge.

The second ground for dismissal is not of much weight. The signature of the judge is only required to final judgments. Code of Practice, art. 546. Other decrees, or orders, made in the course of a suit, may be entered on the minutes, and may be appealed from, if they produce an irreparable injury, although not signed. 12 La. 148. Code of Practice, art. 544.

Upon the first ground for dismissal, we are of opinion, that the judgment is only interlocutory, and does not produce an irreparable injury. The order of the court of the 4th of March, 1844, directing Copland to deliver the transfer warrant to the sheriff, does not, in our opinion, in any manner fix the liability of the garnishee, as it does not order him to pay any sum to the plaintiffs, nor find that he is indebted to the defendants in any amount, but simply orders him to deliver over a transfer warrant, which, he says, in his original answer, was pledged as a collateral security, for a debt due to the bank in Philadelphia, where the evidence of it is held. It would appear, from the course pursued by the plaintiffs' counsel, that they did not consider that order of much force or validity, as they subsequently endeavored to obtain another judgment against Copland, which attempt was not finally acted on when this appeal was taken.

We are of opinion that the appeal is premature; that the questions as to Copland's liability, are still unsettled and open; and, when finally decided, that an appeal can be taken by either party, and their rights finally settled.

Appeal dismissed.

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MARY KILLDUFF MCGAWLEY v. JAMES GANNON. JAMES GANNON v.
MARY KILLDUFF MCGAWLEY.

Action to recover an amount due for drayage, and defence that the price claimed exceeded the value of the services. Plaintiff having proved by a witness that defendant had agreed to pay a certain price therefor, the latter offered to introduce evidence to show that the usual price was less. *Held*, that the evidence was admissible, defendant having a right to introduce evidence to contradict plaintiff's witness, or to establish a different price.

The defendant in an action for an amount claimed for drayage, having previously sued plaintiff, in another court, for a sum alleged to be due to him also for drayage, it was agreed between the parties that the latter suit should be transferred to the court in which the first was pending, to be tried immediately after the first suit. The two suits were ordered by the court to be consolidated and tried together. *Held*, that, when the suit was filed in the court to which it was transferred, it became a part of its records, and was under its control in the same manner as if it had originated there, and that the two actions were properly consolidated.

APPEAL from a judgment of the Commercial Court, *Watts, J.* These two cases were consolidated and tried together, and from a judgment in favor of Gannon, McGawley appealed.

J. F. Jones, for the appellant.

Rousseau and Molloy, contra.

SIMON, J. The first of these suits was instituted for the recovery of the sum of \$422 25, claimed upon an open account, for dray hire, money lent, and for other items said to be due by the defendant to the plaintiff. The defendant pleaded the general issue.

It appears that, previous to the institution of the suit in the Commercial Court, the defendant had instituted a suit in the District Court against the plaintiff, in which he claimed of her the sum of \$448 60, upon an open account of the same nature, that is to say, for dray hire during a certain period, and that, on the day of the trial of the first suit before the court *a qua*, the parties herein filed their written consent or agreement, in which it is specified, that: *It is agreed by said parties that the District Court suit be transferred from the said District Court into the Commercial Court, to be tried immediately after the first suit.* They were accordingly consolidated.

On the second day of the trial, the plaintiff obtained leave to

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discontinue a part of her claim. The two suits were tried together, and, after hearing the evidence, the claims set up by parties respectively were liquidated, leaving, at first, a balance due to Gannon of \$120 23, and judgment was rendered accordingly; but an error having been discovered, the same was corrected, upon the motion of said Gannon's counsel, and a final judgment was rendered in his favor for the sum of \$153 70, from which the plaintiff, McGawley, has appealed.

The record contains two bills of exceptions, which it becomes first necessary to dispose of. 1st. One taken by the appellant to the opinion of the judge *a quo*, who admitted the proof of the usual price of hauling from the steamboat landing to the cotton press. And, 2d. Another also taken by said appellant to the court's ordering the two suits to be consolidated and tried together.

I The court *a qua* did not err. It is true that previous to the offering of this evidence, the appellant had already shown by testimony that the appellee had told her to charge him eight cents per bale, and that the object of the proof offered was to show that the usual price was only five cents; but this is no reason why her adversary should be precluded from introducing evidence going to establish a different price, or to contradict the statements of the plaintiff's witnesses. Her proof was not conclusive—it was subject to be rebutted; and the appellee had, at least, the right of using the evidence offered to impeach the credibility of the plaintiff's only witness by whom the fact had been shown. The testimony was clearly admissible under the pleadings, which denied the price claimed by plaintiff as the value of her services..

II. The appellant had consented to the transfer of the suit from the District Court to the Commercial Court, and when filed in the court *a qua* it had become a part of its records, and was consequently under its control, in the same manner as if it had originated there. From the nature of the two actions, we think, the two suits were very properly consolidated and tried together; the matter in dispute being one of cross-accounts.

On the merits, we have examined the evidence, and are not

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prepared to say that the judgment appealed from is erroneous. The parties appear to have stood towards each other in the capacity of partners for labor, and have acted accordingly; they had the most entire confidence in each other, and seem to have understood in their dealings and transactions that they might mutually rely on each others accounts. We have compared the reasons given below as the basis of the judgment complained of, with the evidence adduced on both sides, and have been unable to discover that any error has been committed; and the appellant has not even attempted to point out any.

Judgment affirmed.

NICHOLAS GURLIE v. JAMES FLOOD.

A judgment discharging the future property of an insolvent, who had made a *cessio bonorum*, from all proceedings for the recovery of debts previously contracted, though it may not have strictly conformed to the law under which it was rendered, will be conclusive against a creditor who was a party to the proceedings, and took no appeal therefrom within the time prescribed by law.

One who was a creditor of an insolvent at the time of his surrender, cannot take out an execution against property subsequently acquired. Property acquired since the cession cannot be proceeded against by any of the creditors individually. It must be abandoned for the benefit of all the creditors, and those who have become such since the first cession must be paid in preference to the others. C. C. 2173.

APPEAL from the Parish Court of New Orleans, *Watts, J. Grivot*, for the appellant.

Crawford and McHenry, for the defendant.

MORPHY, J. The plaintiff having obtained a judgment in this case, sued out an execution, in January, 1834, on which a return of *nulla bona* was made. In February following, a *capias ad satisfaciendum* issued, the return on which shows that the defendant availed himself of the privilege of the prison bounds, as then established by law. In 1836, he applied for the benefit of the laws for the relief of insolvent debtors in actual custody, and a judgment was rendered in due course of law, discharging his person and future property from all process for debts theretofore contracted. A syndic was appointed, and the insolvent, after

taking the oath prescribed by the statute, executed an assignment of all his property to his creditors. In June, 1843, the plaintiff took out an execution, under which a judgment obtained by the defendant in another suit, for \$2,000, was levied upon. This writ was returned into court, and in November, 1844, another execution was issued, when the defendant took a rule on the plaintiff, to show cause why the execution should not be quashed and set aside, by reason of the discharge he had obtained in 1836. The rule having been made absolute, the plaintiff appealed.

His counsel contends that the proceedings had in 1836, only discharged the defendant from the custody of the sheriff, but did not discharge him from previous debts, because no creditors attended at the meeting ordered by the judge; and he has called our attention to the case of *Dufau v. Massicot's Heirs*, 6 Mart. N. S. p. 182. In that case, the judgment obtained by Massicot, a number of years before, discharged him out of custody, but made no mention of his debts. The court held that such a discharge did not release the insolvent from debts previously contracted; that the only cases in which the debtor was discharged from his debts, under the law of 1808, were: *first*, where two-thirds of the creditors consent to such discharge; and *secondly*, where they make an allegation of fraud, and that allegation is found untrue; but that no such consequence is declared to follow the non-attendance of the creditors, and their failure to consent, or object, &c. In the present case, the judgment recites, it is true, as the ground upon which it is rendered, that no opposition was made, nor cause shown by any of the creditors, against the insolvent's being admitted to the benefit of the insolvent laws; but it expressly discharges, not only the person of the defendant, but also his future property from all process for debts theretofore contracted. The plaintiff was a party to the proceedings, and never appealed from the judgment given therein, which has acquired the force of *res judicata*, and is binding on him, although it may not conform strictly to the law under which it was rendered. But even if this judgment was not binding, and did not discharge the defendant from his debts, we

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are clearly of opinion, that the execution issued in this case was properly set aside, on another ground. When a debtor has made a *cessio bonorum*, his newly acquired property cannot be proceeded against by any of his creditors individually, but must be abandoned for the benefit of all the creditors; and when this new surrender or cession is made, the creditors who have become such since the first cession, must be paid in preference to the others. An execution was, therefore, improperly permitted to be issued for the benefit of a single creditor. Civil Code, art. 2173. 4 La. 44. See also the case of *Quimper v. Bierra*, decided in June last.

Judgment affirmed.

RAYMOND PIERRE GAILLARD v. THE CITIZENS BANK OF LOUISIANA.

The managers of a bank appointed under the provisions of the 29th section of the act of 14th March, 1842, providing for the liquidation of banks, may be sued for any cause of action, though arising under the administration of former boards of directors.

Though a bank has been put in liquidation under the 29th section of the act of 14th March, 1842, and an order has been made staying all proceedings against it, a creditor may sue the bank in the court before which the proceedings for liquidation are pending, where he only prays for a judgment recognising his claim, and ordering it to be paid in course of administration.

APPEAL from the District Court of the First District, *Buchanan, J.* This was an action to recover \$825, with interest. The plaintiff prayed that "the Citizens Bank of Louisiana might be cited, and that it be decreed that he recover" the amount claimed; and further, "that whereas said bank is now in course of liquidation, under a judgment of this court, petitioner prays that said judgment be declared executory in due course of administration of said bank"; &c.

BULLARD J. The plaintiff sues the managers of the Citizens Bank, in whose hands its assets and effects are for liquidation under the provisions of the act of 1842, entitled "an act to provide for the liquidation of banks" (section 29th), and asks a

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judgment for eight hundred and twenty-five dollars, with interest, said judgment to be declared executory only in due course of administration.

The bank excepted, that they cannot be sued in the manner and form as set forth in the petition, because, they say, the said Citizens Bank has been put in liquidation, by a decree of the same court, and that an order had been given staying all proceedings against the said bank, which order is still in force; and further, that the property and effects of the Citizens Bank have been put into the hands of commissioners appointed by the State, and that the said commissioners cannot be sued for any act of the former boards of directors of said bank.

The court considering that the plaintiff should establish his claims in the *concurso*, contradictorily with the other creditors of the bank, sustained the exception, and the plaintiff appealed.

The appellees have relied upon a decision of this court, in the case of *Dorville, Executor, v. The Citizens Bank* (9 Robinson, 362), in which a similar exception, pleaded in the Parish Court, was sustained. But we proceeded in that case principally upon the ground, that the action was instituted in a different tribunal from that in which the liquidation had been ordered.

If, by the exception in this case, is meant, that the managers of the Citizens Bank cannot be sued at all, in any court, or form, in relation to any cause of action which may have arisen under the administration of the former boards of directors, it appears to us untenable. We cannot suppose the legislature intended to exempt that institution, while under the administration of managers, from all judicial investigation of their proceedings, or of the obligations of the bank towards individuals, which arose previously to their appointment. The law has provided a peculiar method for the administration of those banks in which the State is a stock holder, or for which it has issued bonds. The exception from the ordinary rule of liquidation is pointed out in sections 28 and 29 of the act of 1842, above mentioned (pp. 250, 251). The latter provides for the appointment of *managers*, and defines their powers and duties. They are to conduct the affairs of the bank in its *corporate name*, and under

the direction of the board of currency. Their powers and duties, and their liabilities, penalties and restrictions, are declared to be the same as provided by the charters of such banks, "so far as not inconsistent with this act, and the act entitled an act to revive the charters of the several banks," &c.

The plaintiff does not ask for an execution ; on the contrary, he only asks that his claim may be recognised, and paid in the course of administration. That part of the statute which relates to the liquidation of the property banks, under which these managers were appointed, does not expressly require them to make out a tableau of distribution ; on the contrary, it provides that, if, after the decree, the stockholders of the property banks shall cause to be returned, and given up to the State, all the bonds issued by the State, in favor of, or on account of said bank, the governor, after cancelling the bonds, shall, by proclamation, if requested by the stock holders, or a majority of them, proclaim and declare, that they are reinvested with all their rights in said bank, as they exist at the time ; and the liquidation of the said bank shall be conducted thereafter, as provided in other cases.

Upon the whole, we cannot construe the order of the District Court, staying judicial proceedings, to mean, that suits like the present cannot be instituted in the District Court against the managers, having for object merely the liquidation of a claim against the bank ; and we think the court erred in sustaining the exception.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, the exception overruled, and the case remanded for further proceedings according to law ; and that the appellees pay the costs of this appeal.

S. L. Johnson and *L. Janin*, for the appellant.

Denis, contra.

Delavigne, Syndic, v. Gaiennié and others.

JOHN C. DELAVIGNE, Syndic of his Creditors, v. LOUIS URBAIN GAIENNÉ and others.

A Recorder of Mortgages cannot be compelled to erase a mortgage without making the mortgagee a party to the proceedings, unless a judgment ordering the erasure has been rendered contradictorily with the latter.

Where a mortgage has been erased in pursuance of a judgment of a court of competent jurisdiction, rights acquired by subsequent mortgagees, before any proceedings to annul the judgment, will not be affected by any illegality in it. Third persons are not bound to look beyond the judgment, which, if rendered by a court of competent jurisdiction, must have its full effect, and can only be annulled by a direct action. *Aliter*, as to the parties themselves, or their *ayans-cause* with notice; as to them, the rights of a mortgagee cannot be affected by any order or decree in a case to which he was not a party.

APPEAL from the District Court of the First District, *Buchanan, J.*

SIMON, J. It appears from the record that a judgment having been obtained by the plaintiff against the defendant Gaiennié, on the 2d of January, 1838, and having been duly recorded in the office of the Recorder of Mortgages, an execution was issued thereon, which was levied on *Gaiennié's* property, which property was sold on a credit of twelve months, in consequence of which a bond was furnished by the purchaser for the benefit of the judgment creditor. After the taking of said bond, Gaiennié, on filing the certificate of the sheriff showing how the proceeds of the property seized and sold, and the bonds given by the purchaser had been disposed of in satisfaction of said judgment, moved the court for an order cancelling the judicial mortgage existing on the rest of his property, whereupon, on the 30th of August, 1839, a judgment was rendered, ordering that *the said judicial mortgage resulting from the recording of said judgment be raised and cancelled*. It does not appear that the judgment creditor was even notified of the motion. The bond due to the plaintiff not having been paid at maturity, an execution was issued thereon, the same property was resold, and only produced an amount which went to the satisfaction of the costs.

It further appears from a certificate of the Recorder of Mortgages that, in consequence of said judgment, and on the filing in his office of a certificate signed by the deputy clerk of the Dis-

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trict Court, on the 2d of September, 1839, the judicial mortgage in question *was cancelled and annulled from the records in his office*; and that, on the 27th of the same month, an act of mortgage was executed by Gaienné upon his property, in favor of the Citizens Bank of Louisiana, to secure a loan made to him; in which act, the judicial mortgage in question is not in any manner stated or alluded to as existing on the property mortgaged, nor is it mentioned in the certificate of the Recorder of Mortgages accompanying the act.

The object of the present action is to reinstate the judicial mortgage against the property of the defendant Gaienné, as though the same had never been erased, and to obtain a judgment that the petitioner be decreed to be an anterior mortgagee to the Citizens Bank, for the amount of his judgment, principal and interest.

The judge *a quo* being of opinion that this action, being in its effect an action of nullity or rescission of the judgment rendered on the 30th of August, 1839, said judgment cannot have any legal effect against a person who was no party to the *ex parte* order obtained on the motion of Gaienné, ordered the judicial mortgage to be reinstated in the manner prayed for by the plaintiff; and from this judgment, the Citizens Bank has appealed.

It is perfectly clear, nay, it is even conceded by the appellants' counsel that the judgment rendered on the *ex parte* motion of the judgment debtor, was illegal and irregular, and that the Recorder of Mortgages could not have been compelled to cancel the judgment recorded, without the privity of the party who had obtained it, or unless said judgment had been rendered contradictorily with the judgment creditor. This has always been the uniform course of our jurisprudence. 2 La. 489. 4 Ib. 17. 6 Ib. 454. 5 Ib. 330. See also the case of *French v. Prieur*, decided in December, 1843 (6 Rob. 299). In the case of *Leverich v. Prieur*, decided in June last, in which this doctrine was again reviewed, we held not only that "a proceeding of this nature ought to be carried on contradictorily with those against whom it is intended to be used;" but we said also, "that the Recorder of Mortgages was not bound, *ex officio*, to make the erasure of

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mortgages, and to expunge them from his books, on being informed of the circumstances under which they were extinguished; and that, although he may perhaps do so, if he is certain of the facts, it will be at his peril, and he will not be protected against the consequences of his act, if improperly done." Here, the mortgage was erased by virtue of a judgment illegally rendered, it is true; but such judgment, though subject to an action of nullity, had been rendered by a court of competent jurisdiction, and the question occurs again: Can the right acquired by the appellants before the judgment was sought to be annulled, be affected by the irregularities existing in the previous proceedings; and were they bound to look beyond the judgment by which the Recorder of Mortgages was authorized to cancel the appellee's judicial mortgage?

This question is not new in our jurisprudence, and since the case of *Casanova's Heirs v. Avegno* (9 La. 195), we have uniformly held, in substance, that a third party, upon whose rights a judgment is to bear as a protection, is not bound to look beyond said judgment, which, if rendered by a court of competent jurisdiction, must have its full force and effect, and cannot be invalidated or annulled but by a direct action of nullity. 11 La. 149. 13 La. 434. 14 La. 146, 468. 17 La. 198. In the case of *Leblanc v. His Creditors* (16 La. 124), the judgment ordering the release of the minor's mortgage, was declared binding with regard to the rights of the subsequent mortgage creditors, notwithstanding the alleged illegalities and irregularities sufficient to annul it; and this doctrine was again fully reviewed in the cases of *Guesnon v. His Creditors*, *Rhodes et al. v. The Union Bank*, and *Dumas, Ex'r, v. Guesnon*, reported in 7 Robinson, in which last case, we said that "*mortgages acquired by third persons under the faith and protection of a decree of a court of competent jurisdiction, which had not then been annulled or in any manner attacked, should have their full effect, and should be satisfied in preference to the mortgage previously and perhaps illegally cancelled.*"

The appellee's counsel, however, has mainly relied on the case of *Dreux v. Ducournau* (5 Mart. 625), to sustain his position, that the appellants were bound to take notice of the irre-

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gularities existing in the proceedings had previous to the judgment, and that they could acquire no right under a judgment tainted with such nullities, and the case referred to appears to have been the basis of the judgment appealed from; but although it was intimated, and even said in that case, that the right of the mortgage creditor ought not to be affected by the order or decree by virtue of which the mortgage was cancelled, as he was not made a party to the action, the point which this case presents was not then at issue contradictorily with a third party contending for mortgage rights subsequently acquired; it was with the purchaser of the property mortgaged, who refused to pay the price, on account of the danger of eviction resulting from the former existence of the old mortgage, and from its having been, within his knowledge, illegally cancelled. This court said: "The defendant, *having knowledge of this*, could not have paid the whole amount promised by him for the plantation, with safety, and ought not, in equity, to be compelled to do it, without being well secured against the mortgagee's claim." This doctrine is not adverse to the one subsequently and repeatedly recognized by this court, with regard to innocent third persons, for, with regard to the parties themselves, or their *ayans-cause* with notice, the right of the mortgagee cannot clearly be affected by any order or decree rendered in a case in which he was not made a party.

The jurisprudence of the country from which we have derived the greatest part of our laws upon this important subject, appears to be concordant with ours. See Sirey, vol. 11, part 2, p. 472, in which it was decided that: "*Lorsqu' une hypothèque a été rayée, le jugement ou arrêt qui en ordonne le rétablissement ne peut lui rendre sa première date; tout ce qui a été fait dans l'intervalle de la radiation au rétablissement est bien fait.*" 12 lb. part 2, 370. See also Duranton, vol. 20, Nos. 202 and 203, in which the commentator says: "*Mais ni le recours en cassation, ni la requête civile ne suspendent l'exécution des jugemens, encore que le pourvoi eût été admis ou que la requête civile eût été reçue, tant que le jugement ou l'arrêt n'aurait pas été cassé ou rétracté; par conséquent l'inscription peut être rayée. Cela peut sans doute devenir funeste*

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au créancier, dans le cas où, en définitive, il gagnerait sa cause, car l'inscription ne serait point rétablie à sa date primitive par rapport aux tiers qui auraient, depuis la radiation, pris des inscriptions sur les mêmes biens ; autrement le principe de la publicité serait violé dans ses conséquences." And see *Paillet, Manuel de Droit*, on art. 2157, s. 6. Under our laws, the principle of publicity of mortgages is equally important and inviolable ; it is the basis upon which the rights of mortgage creditors rest, and the source from which they are derived (C. C. 3297, 3317) ; and were we to recognize that, with regard to third persons, strangers to anterior judicial proceedings, erasures of mortgages, apparently legal, and sanctioned by a judgment of a court of competent jurisdiction, can be enquired into and successfully disputed ; and that such mortgages can be *reinstated* with all their previous and anterior effects, there would result the greatest confusion in our system of mortgages ; no reliance could be placed on the certificates of their recorders ; no man would dare to transact any business in which this contract would be the basis of the transaction ; and our laws upon this subject, instead of being a protection to honesty, and a beacon to our citizens in one of their most ordinary transactions of life, would be used as means by which frauds could be successfully practiced, or as snares to the unconscious and unwary. We cannot sanction the doctrine adopted by the judgment appealed from, by which, as Duranton says, the principle of the publicity of mortgages is violated in its consequences ; and we conclude that the judge *a quo* erred in reinstating the plaintiff's judicial mortgage, in its effect against the rights acquired, since its erasure, by the appellants.

With regard to the defendant Gaienné, the judgment appealed from must stand, and the mortgage be reinstated. It is true he has not appealed ; but had he thought proper to do so, it is clear that, as to him, the erasure of the plaintiff's mortgage, being illegal and irregular, cannot affect the rights of the latter. The distinction is a very obvious one, recognized by the authorities above quoted.

It is, therefore, ordered and decreed, that the judgment of the District Court, with regard to the appellants, be annulled

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and reversed, and that the plaintiff's demand, as to them, be rejected and dismissed, with costs in both courts.

Delavigne, plaintiff, *pro se*.

Denis and *Pitot*, for the appellants.

THE CITIZENS BANK OF LOUISIANA V. LOUIS URBAIN GAIENNIÉ.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*
SIMON, J. An order of seizure and sale having been sued out by the Citizens Bank of Louisiana, against certain property mortgaged by the defendant, Gaienné, to secure the payment of a loan of money, by an authentic act, executed on the 27th of December, 1839, and duly recorded in the office of the Recorder of Mortgages; and the property mortgaged having been seized and sold in due course of law by the sheriff, and adjudicated to the mortgagees in satisfaction of their claim, John C. Delavigne, the plaintiff in the suit of *Delavigne, Syndic v. Gaienné et al.*, just decided, first intervened in the proceedings, praying that he be decreed, as anterior judicial mortgagee, to be entitled to be paid the amount of his judgment, out of the proceeds of the sale of said property, in preference to the Citizens Bank; and he afterwards obtained a rule upon the sheriff to show cause why he should not pay over to him, the opponent, the sum of \$458 51, as the amount due on his said judgment.

The rule was answered by the Citizens Bank, who opposed the application, on the ground that, according to the books of the Recorder of Mortgages, as appears from the certificates, there was no mortgage whatever on the property of the mortgagor sold in this case, at the time the mortgage of the bank was executed and recorded.

The judge *a quo* made the rule absolute, and rendering a judgment somewhat hypothetical, and even contingent in its effect, ordered the sheriff to pay the money to the opponent, only when the judgment of the District Court upon which the latter relied, (rendered some time previously, but from which an appeal had been taken to this court,) should be in a situation to be carried

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into execution. From this judgment, the Citizens Bank has appealed.

In the case just decided between the same parties, we have said that the pretended judicial mortgage of the appellee, having been erased by virtue of a judgment rendered by a court of competent jurisdiction, did not exist on the books of the Recorder of Mortgages at the time the appellants' mortgage was executed and recorded; and that, no attempt having even been made then, or before to revive it, we were firmly of opinion, that with regard to the said appellants, who were not bound to look beyond the judgment ordering its cancellation, the judicial mortgage of the appellee, though illegally cancelled, could not be reinstated, so as to affect the rights acquired, since its erasure, by third persons.

It results, therefore, from the judgment just rendered by us in the first suit, reversing the decree of the District Court upon which the final adjustment of the matter in controversy in this suit depended, that the judgment alluded to in that now under consideration, can never be carried into execution, and that the rule obtained by the appellee must be discharged.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that the rule upon which it was rendered, be discharged, with costs in both courts.

Denis and Pitot, for the appellants.

Delavigne, pro se.

BENJAMIN MANDION v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS—CALLOWAY, Garnishee.

A stockholder in an insolvent company, a part of whose subscription is unpaid, cannot, by a donation to an insolvent individual, made to get rid of his liability for such unpaid stock, avoid responsibility as a stockholder. A creditor, having a *feri facias* against the company, may proceed against him in the manner pointed out by the 13th section of the act of 20th March, 1839, and, on proving that the donation was not real, recover judgment for any balance due on the stock.

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APPEAL from the Commercial Court of New Orleans, *Watts, J. Rozier*, for the plaintiff.

J. Strawbridge, for the appellant.

BULLARD, J. The plaintiff having a judgment against the Firemen's Insurance Company, caused a *fieri facias* to issue, and proceeded by garnishment against Calloway, who had been one of the stockholders, and was alleged to owe the company a part of his subscription for stock. Interrogatories were propounded to him, and his answer, tending to show that he had made a donation of his stock to one Douglass, and was no longer bound as stockholder, was traversed by the plaintiff, as provided by the act of 1839 to amend the Code of Practice, sec 13.

The evidence taken on the issue thus made up, satisfied the court of the first instance, that, at the time the stock was given by the defendant to Douglass, it was utterly worthless, the institution being insolvent; and that Douglass, the pretended donee, was equally insolvent; and that the defendant in the garnishment evidently disposed of the stock, not with a view of making a real donation, but to avoid liability as a stockholder. A revocatory action in such a case would be an idle ceremony, because the only effect of such an action is to make the thing, forming the object of a fraudulent contract, subject to the debt of the suing creditor. Now, in this case, the stock itself which formed the object of the donation, was without value, and could not have been sold to pay the plaintiff's debt.

There is nothing in the record to satisfy us that the court erred.

Judgment affirmed.

BENJAMIN MANDION v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS— Spangenberg, Garnishee.

Where stock, on which a balance was still due on account of the original subscription, was transferred to a third person merely to secure a loan, and, on payment of the loan, was retransferred, such third person will not be liable to creditors of the company for any balance due on the shares, where the transfer, though an absolute one on its face, was not signed and accepted so as to preclude him from showing that it was intended only as a security.

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APPEAL from the Commercial Court of New Orleans, *Watts, J. Rozier*, for the appellant.

Jewett, for the appellee, Spangenberg, contended that form is not of the essence of the contract of pledge. 7 Toullier, 613. 18 Duranton, 586. 8 Pothier, 610. Du contrat de Nantissement, ch. 1, art. 2, s. 17. That the intention of the parties must prevail. Civil Code, art. 1940, s. 2. 1 Rob. 247. And that a pledge may be created by a contract in the form of an absolute sale. Ames on Corp. 344. 4 Pickering, 410. 7 Cowen, 412. 1 Mart. N. S. 407.

BULLARD, J. This case is somewhat analogous to the one of the same plaintiff, which was just decided, and relates to the ownership of fifty-seven shares of stock in the Firemen's Insurance Company, standing at one time in the name of Spangenberg, the garnishee, and his liability for a balance still due on the stock.

Spangenberg, in his answer to interrogatories, discloses the following facts, to wit: that the stock belonged originally to Robert Ferriday; that Ferriday transferred it to Spangenberg, merely as collateral security for a loan of money, which the latter had made to him; that Ferriday went into bankruptcy, but had previously paid the loan; and that, in pursuance of their original agreement, he had transferred the stock to Conrad, the assignee of Ferriday. He says he never was the owner of the stock; that he held it only as collateral security, and as the trustee of Ferriday; and that there was nothing simulated or collusive in the transaction.

These answers were traversed by the plaintiff, who alleges that the garnishee was and still is a stockholder, and owes the company as such, \$2,000. He denies the pledge, and alleges that no notarial act of pledge was passed so as to operate to the prejudice of third persons; he denies that any sale was made to the assignee of Ferriday; and avers that the assignee had no right to make such a purchase.

Upon the trial of this traverse, Ferriday was examined as a witness. He states that, in March, 1840, he borrowed some money of Spangenberg, and that the only means he had of securing the payment of it was to transfer fifty-seven shares of stock in

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the Firemen's Insurance Company ; and that, on the 30th of November, 1840, he did transfer the stock, merely as collateral security. In May, 1841, he repaid the money, and, early in 1844, it was retransferred to the assignee. He further stated on his cross examination, that the dividends received by Spangenberg were paid over to him. It appears that, in February, 1843, Ferriday, who had omitted the stock in his schedule when he filed his petition in bankruptcy, amended it by setting forth the stock as belonging to him, though standing in the name of Spangenberg, and it was afterwards retransferred to his assignee. The judgment against the Insurance Company in this case was not rendered until Nov. 1844. At the date of the transaction, in 1840, the company was in good credit, and the stock not depreciated.

We concur with the learned judge of the Commercial Court in the opinion, that the evidence supports the answer of the garnishee. The original transaction took place at a time not suspicious, when the stock was at par, and long before the present plaintiff had acquired any right. Although the transfer of the stock to Spangenberg appears on its face to be an absolute one, yet it was not signed and accepted by the garnishee so as to preclude his showing that it was only intended as collateral security, and his answer on oath to interrogatories propounded by the plaintiff, also made a witness, discloses the true character of the transaction. He was particularly interrogated as to the character of any transfers he may have made, and whether they were not simulated and fraudulent, and intended to defeat the rights of the creditors of the company ; and his answers negative the allegation of simulation and fraud, and are corroborated by other evidence which is unimpeached.

Judgment affirmed.

Sheldon v. The New Orleans Canal and Banking Company.

VARNUM SHELTON v. NEW ORLEANS CANAL AND BANKING COMPANY.

The mere seizure under a *fi. fa.* of a judgment in favor of a debtor, does not divest the property of the latter, and transfer it to the seizing creditor. It gives him at most a right to proceed and sell the judgment, and to be paid by preference out of the proceeds. A *fi. fa.* is the warrant of the sheriff, authorizing him to seize property and keep it, and to sell it to satisfy the judgment under which it was issued. When a seizure has been made, the sheriff is not bound to return the writ, though it have subsequently expired. He may retain it, and sell the property seized. If he returns the writ, he will be without authority to hold, or dispose of the property; and any privilege resulting from the seizure will cease to exist.

Where the proceeds of property seized and sold under a *fi. fa.*, are claimed in virtue of a previous seizure under a *fi. fa.*, the claimant must oppose, by way of third opposition, the application of the proceeds to the satisfaction of the second execution. C. C. 396, 397, 401, 402.

APPEAL from the District Court of the First District, *Buchanan, J.*

C. M. Jones, for the appellants.

Van Matre, contra.

MORPHY, J. Varnum Sheldon recovered in the court below a judgment against the Canal Bank for \$1,000, from which an appeal was taken. Pending this appeal, Hunt and Servis, who were judgment creditors of Sheldon for a larger amount, issued an execution on the 3d of December, 1842, under which it appears that this judgment was seized and advertised for sale, but the sale was stayed, by order of the plaintiffs in the suit, and the writ was returned into court, on the third Monday in January, 1843. On the 12th of May following, Cook and Barrett, other judgment creditors of Sheldon, levied an execution on the same judgment, had it sold on the 23d of November, and became themselves the purchasers of it at the sheriff's sale, for the sum of \$150, which was credited on their execution. They made themselves parties to the suit in the appellate court, and notified the Canal Bank thereof. The judgment in favor of Sheldon having been affirmed on the appeal, the bank deposited the amount of it with the clerk of the District Court, whereupon Hunt and Servis took a rule on Cook and Barrett to show cause why the amount deposited should not be paid over to them, on the ground that they had a privilege thereon, resulting from

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their seizure of the judgment, in December, 1842. In answer to this rule, Cook and Barrett averred, that they were the legal and *bona fide* owners of the judgment, and were alone entitled to receive its amount, having bought it on their own execution for the sum of \$150, which was applied in part satisfaction of their writ, without any opposition, &c. The rule having been dismissed, and the money ordered to be paid over to Barrett and Cook, this appeal was taken.

Cook and Barrett being admitted in the record to have become the purchasers of Sheldon's judgment against the Canal Bank at the sheriff's sale made under their execution, it is difficult to perceive what right to the money deposited in court Hunt and Servis can derive from their seizure of this judgment. The mere act of seizure did not divest Sheldon of his property in it, and transfer it to these creditors. It gave them, at best, the right to proceed and sell said judgment, and to be paid by preference out of the proceeds of such sale. Their claim then, if they have any under their seizure, must be, not to the amount of the judgment paid by the Canal Bank, but to the price brought by the sheriff's sale of it, subsequently made on the execution of Cook and Barrett. Had they not stayed the proceedings of the sheriff on their writ, and directed or permitted it to be returned into court, their seizure, being the first in date, would have entitled them to a preference on the proceeds of such sale; but by the course they have pursued, they appear to us to have abandoned and lost any rights they may have acquired under their seizure. The writ of *feri facias* is the warrant or authority of the sheriff to seize property, and to keep and sell it to satisfy the judgment under which it issues. When he has made a seizure, he is not bound to return the writ, although it has since expired. He may keep it, and proceed to the sale of the property levied upon; but if he returns the writ, he is without authority to hold or dispose of the property seized. In the present case, Hunt and Servis having stayed the sale, and given no directions to the sheriff to keep the writ in his hands, that officer must have considered it his duty to return it into court, where it expired. As soon as this was done, the privilege resulting from the seizure ceased to exist, because the seizure

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itself was at an end, and had an *alias* execution issued it would have been necessary to make a new seizure under it. 1 Rob. 540. B. & C.'s Dig. p. 786, sec. 10. See also the cases of *Cochrane et al. v. The Bank of the United States*, ante p. 64, and *Simpson v. Wiltz and others*, decided in May, 1844, (7 Robinson). But even if Hunt & Servis had not lost the privilege resulting from their seizure, as they contend they have not, they should have opposed the application of the proceeds of the sale in part satisfaction of the execution of Cook and Barrett, by way of third opposition, and should have claimed such proceeds. Having failed to do so, they are now precluded from establishing any privilege thereon. Code of Practice, arts. 396, 397, 401, 402.

Judgment affirmed.

SUCCESSION OF THOMAS DURNFORD—JOHN McDONOGH, Appellant.

The obligations of a warrantor depend upon the law in force at the time of the sale.

Under the Code of 1808, the vendor was bound, in case of eviction of the purchaser, to pay him, in addition to the price, &c. the increased value of the property at the date of the eviction, though the purchaser did not contribute to such increase. Book 3, tit. 6, arts. 54, 57. The original price, added to the rents and profits, does not necessarily constitute the measure by which the liability of the warrantor is to be ascertained; other things must be taken into consideration; and the general rule, that damages are to be measured by the loss actually sustained, and not by the gains of which the party has been deprived, is inapplicable.

The curator of a succession credited himself in his account with a sum, exceeding the amount of the assets of the succession in his hands, which he claimed in consequence of eviction from land sold to him by the deceased. On the opposition of the heirs, it was decided, that the claim of the curator, so far as it exceeded the assets in his hands, was prescribed; and judgment was rendered allowing his claim to the amount of such assets. On appeal: *Held*, that the claim was an entire one, arising from the same cause, and could not be prescribed in part; and that the account should be homologated.

APPEAL from the Court of Probates of New Orleans, *Watts, J. GARLAND, J.* This case was before us in June last (See 8 Rob.), and was then decided as to all the points at issue, except so far as relates to a demand of twenty-one thousand five hundred dollars, set up by the curator against the heirs and opponents, as being the value of a tract of land, of which he was

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evicted by the syndic of DeGruys (See 2 La. 544), in which respect the judgment of the Probate Court was reversed, and the case remanded for a new trial, for the purpose of ascertaining what was the real value of the land sold by Durnford to McDonogh, at the time of eviction, in July, 1831.

On the new trial, a large number of witnesses were examined, and their testimony and estimates taken down in detail. They were examined as to the quality and quantity of the land, its situation, its capacity to produce sugar and other products, the facilities of navigation and communication with New Orleans, and as to many other things ; also as to its value at almost every period from the date of the sale in 1823, up to the time of the trial.

From the statement of the witnesses, the sale from Durnford, and the record of *DeGruy's Syndic v. Hennen and McDonogh*, we ascertain that, in 1823, Durnford sold to Hennen, as agent of McDonogh, a tract of land of thirty *arpents* front on the bayou Ouacha, by a depth of 110 *arpents*, for the sum of \$4,000, with a full warranty of title. In July, 1831, McDonogh was evicted of this tract of land by the syndic of DeGruys (2 La. 544), and he now claims \$21,500, as the damages sustained by the eviction. The land is situated about eighteen miles from this city, fronts on one bayou, and has another, called *des Familles*, running longitudinally through it, nearly its whole depth of 110 *arpents*. It is this circumstance which has in some, if not a great degree, led to confusion in the statements of the witnesses, and to their widely different estimates of its value, as some of them seem to have spoken under the impression, that the depth of the high or tillable land was to be calculated from the bayou *des Familles*, instead of commencing on the Ouacha, and running parallel, or nearly so, with the other stream. They all state that the high land is of excellent quality, well adapted to the culture of sugar-cane ; but they differ widely as to the quantity of such land, and the value. This difference, no doubt, arises from the uncertain and contradictory bases assumed for the various calculations. Several witnesses of respectability and intelligence estimate the value as high as \$30,000, in 1831. One fixes

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it at about \$17,500 ; a third, at from nine to twelve thousand dollars ; another says \$5,000 ; and Dugué says, the land was worth only \$3,000 in 1831, and \$6,000 in 1837 ; but this latter estimate is met by the fact that, at that period, about two-thirds of the tract actually sold at public auction for \$21,500, which goes to prove that his estimate is not of much weight. Some of the witnesses have only seen the land on the bayou *des Familles* ; others have not examined it particularly. Some put no estimate on it at all, whilst Bringier and Hemecourt, who are surveyors, and know it well, value it highly. Bennet and Durnford have known the land a long time—have been over it, and they appraise it at a high rate. The witnesses who know the land best, value it the highest. The witness Millaudon, and one or two others, have a sliding scale of valuation, and raise, or depress the price, as sugar goes up, or declines in its market price. According to them the land would be much more valuable one year than another. Some of the witnesses testify as to the value of the land in 1823, in 1825, and at other dates up to 1831 ; and also as to the gradual increase of the value of the land from 1823 to 1831 ; but their calculations are as various on that point, as on any of the others. In the argument, the counsel for the opponents admitted, that an increase in the value of the land from 1823 to 1831 was proved ; and stated it as amounting to about twenty-five per cent on the price given in 1823.

The probate judge, in the reasons for his opinion, says that he thinks the evidence makes out the value of the land at the time of eviction, as exceeding the assets of which the curator had the *seizin*, when the heirs presented themselves ; but he refused to give a judgment in favor of McDonogh for more than the sum admitted to be to the credit of the succession of Durnford,* as, he says, the excess is barred by prescription. From this judgment McDonogh has appealed ; and the heirs have also joined in it ; he praying, that the amount may be increased, and he declared a creditor of the estate ; and the heirs asking that his demand be rejected, or that the sum allowed by the court below be reduced.

* 9,809 26.

When this case was last before us, it was decided that, as the contract of sale between Durnford and McDonogh was made under the old Code, the law in force in 1823 was to regulate the claim for damages consequent on the eviction ; and further, that prescription did not operate as a bar to the claim.

In the old Code, p. 354, art. 54, we find the law to be, that the buyer, if evicted, "has a right to claim against the seller : 1st, the restitution of the price ; 2d, that of the fruits or revenues, when he is obliged to return them to the owner, who evicts him ; 3d, all the costs occasioned, either by the suit in warranty against the buyer, or by that brought by the original plaintiff : 4th, in fine, the damages, when he has suffered any, besides the price that he has paid." Article 57 says : "If, at the time of eviction, the thing sold has risen in value, even without the buyer having contributed thereto, the seller is bound to pay him the amount of said augmentation of value above the price of the sale. Article 1663 of the Code Napoleon, is almost in the same terms. The above articles of the old Code have heretofore been brought up for the consideration of this court, and in the case of *Fletcher's Heirs v. Cavelier, &c.* (10 La. 117), it was decided, that the obligations of the warrantor depend on the law in force at the time of sale, and that, according to the above articles, the seller is bound, on the eviction of his vendee, to pay the augmented value of the property, above the price of the sale ; and the court said, in commenting upon the argument of the counsel for the warrantors, "it is, therefore, clear, that the original price added to the rents and profits, does not necessarily constitute the measure by which the liability of the warrantor is to be tested." Other things must, therefore, be taken into consideration.

Toullier, title 3, *Des Contrats*, No. 285, in commenting on the article 1633 of the Code Napoleon, says it seems to contain an exception to the general principle as to the responsibility for damages, and that if a *heritage*, or piece of ground is sold in good faith, which since the sale has quadrupled in value by the establishment of a new city, or the opening of a canal, or any other extraordinary event, the seller is bound, in case the vendee is evicted, and, notwithstanding his good faith, to reimburse what the ground may be worth, over and above the price, although

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the event which has quadrupled the value, was not, and could not be foreseen. See also 16 Duranton, p. 313, No. 295. 27 Dalloz, part 1, p. 93. There is, in fact, not much difference of opinion as to what the law is; but the application of it to this case is the question. The counsel for the opponents do not deny, if there has been an actual augmentation in the value of the land between 1823 and 1821, that they are bound to reimburse it; but they deny that there has been an increase to the extent claimed. Their idea seems to be, that some regular scale of augmentation should have been adopted and proved by the witnesses, and that their opinions of what was the value of the land in 1831, should not be the measure of damages. They say that the land remained in the same state at each period, and that there was little or no augmentation in value; and that if the opinions of the witnesses introduced by McDonogh should prevail, it would enable him to make an enormous speculation. These arguments are plausible, but they do not strike us as being exactly correct. The law is, that the vendee, when evicted, is entitled to recover the value of the property at the time of the eviction, and, therefore, the expression used, that if "the thing sold has risen in value, even without the buyer having contributed thereto, the seller is bound to pay him the amount of said augmentation." It is clear that the law-maker intended that the vendee, when evicted, should be indemnified fully, and the general rule as to damages is not applicable, that is, they are not to be measured by the loss the party has actually sustained, but by the gain of which he has been deprived; therefore McDonogh is entitled to the value of the land in 1831, and it remains to be ascertained what that value was. The counsel for the opponents are of opinion, that in weighing the testimony, the price given in 1823 should always be kept in view. We do not think so. The simple question is, what was the value of the land in July, 1831, the date of eviction? and to fix it, we know of no other criterion than what the property is worth, or would sell for, in the opinion of witnesses sworn to estimate it. It is a question of fact, and, like other questions, must be settled by considering all the testimony given.

We have already said that the estimates of the witnesses are

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widely different ; it is, therefore, our duty to examine them all, and ascertain the true state of the case. There is nothing in the record to induce us to believe, that the witnesses are not all entitled to credit ; we have, therefore, considered the circumstances under which they have testified, and their opportunities of knowing the land at the period in question. D trehan, Bennett, Bringier and Durnford, estimate the land at a high rate. Hemecourt does not value it so highly. His own land, which adjoins that sold to McDonogh, he thinks is worth \$1,000 the front *arpent*, but he thinks his land is the best ; other witnesses think it is not. Boutt  and Villars do not fix any particular sum ; but the former thinks it is a fine tract, and the latter is of a different opinion. Millaudon, Commag re and Dugu , each fix upon much smaller sums than the others. The latter values it, in 1831, at \$1,000 less than it sold for in 1823 ; and says that, in 1837, it was not worth more than \$6,000, when it was actually sold for \$21,500. After a full consideration of all the testimony, we are of opinion that the land was, on the day of eviction, the 19th of July, 1831, worth about the sum of eighteen thousand dollars ; which sum McDonogh is entitled to have a credit for at the above date, in the settlement of his account as curator of Thomas Durnford.

The Court of Probates decreed that the curator should have a credit on his account for the sum of \$9,809 26, which was the balance of the estate remaining in his hands ; although, in the reasons given by the judge for his judgment, he, in effect, says the evidence showed that the land was worth a great deal more : but he is of opinion, that so much of the claim as exceeds the assets in the hands of the curator, is prescribed. In this we think the judge wrong. The claim set up is an entire one, arising from the same cause ; and we cannot see how a part of it is prescribed, and a part not. The fact of the succession not being sufficient to pay all the demands against it, cannot give rise to prescription. When this cause was before us in June last, we said, in terms, that the claim set up was not prescribed ; and, in approving that part of the reasons or arguments of the judge to prove that prescription did not run against it at all, it cannot be fairly said, that his arguments to prove that a part

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was prescribed, were approved also. The judgment of the Probate Court rejecting this claim, was reversed in this court in all its parts, and the case remanded to enable that tribunal to ascertain the amount of it, and to strike the balance. If we had been of opinion that the claim was prescribed, it would have been inconsistent with the plain rules of common sense to have sent it back for a new trial, and thus impose a useless duty on the Probate Court. The former judgment of this court will not bear any such interpretation as has been put on it; and, consequently, the probate judge erred in deciding, that so much of the claim set up by the curator as exceeded the assets in his hands, was barred by prescription.

For the purpose of finally closing the account of McDonogh according to law, it will be necessary to remand the cause again to the Probate Court, where the judge can enter a credit for eighteen thousand dollars on the account of the curator, on the 19th of July, 1831, strike the balance, and give a judgment according to article 1007 of the Code of Practice.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be annulled and reversed, and the case remanded to that court, with directions to the judge thereof, in the settlement of the account of John McDonogh, as curator of the estate of Thomas Durnford, deceased, to give said McDonogh a credit on said account for the sum of eighteen thousand dollars, of the date of the 19th of July, in the year 1831, and to close the account, and give judgment according to law; the opponents paying all the costs of their oppositions, and of this appeal; the other costs in settling the succession accounts, to be paid out of the funds in the hands of the curator.

A. Hennen, for the appellant.

Elmore and W. W. King, for the heirs.

Alley and others v. Robinson. Barker and another v. Phillips.

SAUL ALLEY and others. v. CARY ROBINSON.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Elmore, W. W. King* and and *L. Pierce*, for the plaintiffs. *Randall*, for the appellant.

MARTIN, J. The defendant, sued upon an account annexed to the petition, pleaded the general issue, and prayed for a trial by jury. There was a verdict and judgment against him, and he appealed, without any attempt to have the verdict set aside.

He is since dead, after having availed himself of the laws of bankruptcy, under the acts of Assembly of this State and those of Congress. The curator of his estate, his syndic, and assignee, were made parties to the appeal, neither of whom has filed any point from which we may discover on what ground he had built his hope of our interference with the verdict of the jury, or the judgment thereon.

We have examined the record, and have been unable to discover any error in the verdict.

Judgment affirmed.

GRIFFIN BARKER and another v. ALFRED PHILLIPS.

The property of a debtor being the common pledge of his creditors, every act done by him with intent to deprive them of their eventual rights upon it, is illegal. C.C. 1963, 1964.

Where one purchases property from an absconding debtor, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, it will be annulled. C.C. 1973. But the purchaser, though in bad faith, will be entitled to a restitution of so much of the consideration or price paid by him, as he shall prove to have enured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. C. C. 1977.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

SIMON, J. A writ of attachment having been sued out in this case, and in two other cases against the property of one Alfred Phillips, the same was levied upon a certain number of boxes of merchandize and some loose dry goods, which were found in the

possession of one Stewart Haynes, who claimed them as his ; whereupon the officer having refused to seize them until a bond of indemnity was given, such bond was furnished by the plaintiffs, and the sheriff proceeded to attach and seize the goods and boxes in the manner directed in the writ, and they were afterwards delivered to J. A. Beard & Co., by consent of parties.

William Haynes intervened in the suits, alleging that the property attached was his, and that the said goods and merchandize were his property before, and at the time of the execution of the writs of attachment, of which the sheriff was then informed, the same being in his possession at the time of the seizure; and that, although so informed, he did seize and take into his possession the said dry goods and merchandize, against the will of the intervenor. He prayed that the goods be decreed to be his property, and for general relief. This was generally and specially denied by the plaintiffs, who further alleged, that if any sale was ever made, the same was simulated, and intended to defraud Phillips' creditors.

The title of the intervenor to the property attached, was fully investigated below, and judgment having been rendered in favor of the plaintiffs, for the whole amount of their claim against the defendant, William Hayne's intervention was dismissed, and the amount of the judgment ordered to be paid, by preference, out of the proceeds of the property attached, and since sold by consent of parties. From this judgment, the intervenor has appealed.

The record discloses the following facts: It appears that Phillips, who was a shop-keeper in New York, some time in February, 1841, absconded from his residence, and came with his goods to New Orleans, on board of the ship Huntsville, under the feigned name of Allen Prentiss. The bill of lading was signed for eleven boxes of merchandize as shipped by A. Prentiss, to be delivered to him or to his assigns; and, on the 29th of March, an attachment having been sued out against him by one of his New York creditors, the same was levied on the goods on board of the vessel. On the 31st, another attachment was instituted against said Phillips, which was also levied on the same goods on board of the Huntsville, when, in the mean-

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time, Phillips, who was in search of legal assistance, applied to Franklin Haynes, Esq., an attorney and counsellor at law, and stated to him that he had got into difficulty. He said that a creditor to the amount of \$600 had seized some goods he had brought out by the ship Huntsville, with the intention of setting up in Texas, but that he should sell his goods and go up the river. F. Haynes told him to bring the invoice, and that he would show it to some persons, who, perhaps, would purchase the articles. The witness (F. Haynes) mentioned this circumstance to his brother William, and told him he had better examine the goods, as he might make a good speculation, if they could be purchased cheap enough. On the day the second seizure was made, Phillips came to Hayne's office, and informed him of his finding a purchaser for the goods, who objected on account of their being in the sheriff's hands. He said that these were all the debts he owed. F. Haynes asked him how much he would take for the goods? He said \$3,000, and the witness offered him \$2,500 for the whole. It was agreed, a day or two afterwards, that Mr. Haynes should have the goods for the amount offered (\$2,500), and, as a part of the consideration, William Haynes was to be the security of Phillips in the two suits, for about \$1600, or \$1700. Phillips was asked if he owed anything more, and he said no. Witness (F. Haynes) then drew up the act of sale, which is dated the 31st March, 1841, and it was signed by Phillips. Witness' brother remarked that he had not the money, and witness offered to loan it to him, upon which witness drew a check for \$800, which was given to Phillips, and he retained \$1600 of the amount. Witness also made Phillips write an assignment on the bill of lading, and he signed it, but *the name inside being in the name of Prentiss, witness made him, Phillips, sign the assignment in the same name.* F. Haynes further states that, on the 2d of April, he drew out the check of \$1600, and the amount was handed to the sheriff to make the surety of William Haynes good, whereupon the sheriff released the goods, which were removed by order of W. Haynes to the house of Stewart Haynes, to assort the goods and prepare them for sale, as he had more leisure. On the 5th of April, the sheriff seized the greater part of the goods on the writs in these cases,

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and what remained were furniture, bedsteads, &c. worth about \$200.

It is further established by the evidence, that William Haynes resides in the upper part of the city, at the corner of Race and Magazine streets, where he keeps a grocery establishment; that part of the goods attached were found in a private dwelling-house in Amour street, in the Third Municipality; that Stewart Haynes was there, and said that he had a bill of sale of the goods; that the officer would not seize them then, until a bond of indemnity was given, but he obtained the bond, and returned, after some time, on the same day, to make the seizure. When the goods were seized, they seemed to be the same as when they were first found. After having been put into a cart, the officer asked S. Haynes whether they were all, and he answered affirmatively, and distinctly said that these were the goods belonging to Prentiss or Phillips, who came out in the ship Huntsville.

The testimony of F. Haynes, who was the only witness examined for the intervenor, further shows, that William Haynes has satisfied him by paying him in money and in notes; that he paid \$2000 in cash, and \$500 in his notes; and on being asked how William Haynes acquired the money to refund it to the witness, the latter answered that his brother William had means within himself, that he is a very penurious man, and saves all he can get. The witness further stated that he believed Phillips when he said he only owed \$1,600; that he did not know whether Phillips, had money with him or not; that Phillips said he had property enough in New York to pay the notes; that, if the plaintiff, Hart,* had been nonsuited, the \$1,600 kept back would have been given to Phillips; that he, witness, paid Phillips the \$800, before he, witness, came to see any thing about the attachment, and before he knew anything about said attachment; that the goods were examined by Stewart Haynes, before they were purchased, but that the \$800 was

* Hart was plaintiff in the two attachment suits first instituted against Phillips. These attachments were levied on the 29th and 31st March, 1841. The attachment in this suit, and in the two succeeding cases, was levied on the 5th of April.

paid before witness went to see what attachments were on the goods ; and being informed that the attachment was for \$600, he was satisfied with paying Phillips \$800, and keeping the \$1,600.

The evidence also gives a full statement of all the circumstances which preceded and followed Phillips' absconding from New York ; of his conduct on board of the ship ; of the debts which he left unpaid ; and of the value of his stock of goods in New York previous to his departure, judged to be worth about \$8000. On referring to the petitions and affidavits upon which the two first attachments were obtained and sued out, we find it therein stated, under oath, that the defendant, *Phillips*, has fraudulently assumed the name of *Allen Prentiss* to avoid his creditors, and to disguise his property from them ; that he absconded from the State of New York, is now on his way to Texas, and about to remove his property there, &c.

With this evidence before him, the judge *a quo*, being of opinion, that "it is a manifest inference from the facts disclosed, that both W. and F. Haynes are to be legally charged with the notice of all that was alleged and sworn to in the petitions and affidavits for the two attachments, to wit : that Phillips was an absconding debtor, and had run off under a feigned name with his property, and that the whole circumstances were such as to put the most unsuspicious person on enquiry," came to the conclusion that, "Franklin Haynes, who is a licensed attorney and counsellor, and his brother, the intervenor, must be charged with full notice of all the facts alleged and sworn to in said petitions, and and affidavits ; that any attempt to purchase goods with a knowledge of such facts can confer no legal right to them, and that the loss of the money so advanced, is the smallest punishment which ought to be inflicted on parties who act in this manner."

It is a principle of our law, that the property of a debtor, being the common pledge of his creditors, every act done by such debtor, with the intent of depriving his creditors of the eventual right they have upon his property, is illegal (Civil Code, arts. 1963, 1964) ; and that any contract made with the view of defrauding creditors, ought to be annulled, if it prove injurious to them, unless the person with whom the debtor contracted was

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in good faith. Arts. 1773, and 1794. This last rule, however, is subject to certain limitations which the law has provided for, and which are mentioned in the following articles of our Code on this particular subject.

Now, it cannot be denied in this case, that the sale made by Phillips to William Haynes, was by him intended to defraud the plaintiffs in the three suits; that the property, which had originally been attached by Phillips' creditors in the two first suits, was withdrawn from the hands of the sheriff, for the purpose of avoiding the seizures which he expected would be exercised against him, and that, in the words of the law, his object was to deprive his creditors of the eventual right which they had upon the property. But the question occurs: Was the purchaser in good faith? or, in other words, had he notice of such circumstances as were sufficient to put him on his guard, and did he buy after being aware of the position in which his vendor stood towards his creditors? This question, in our opinion, was correctly answered in the affirmative by the judge *a quo*. Indeed it is very difficult to believe that F. Haynes, an attorney at law, whose advice was sought by Phillips to get him out of the difficulty in which he was placed under the two attachments, Phillips having previously employed another counsel who had his office with Haynes, was ignorant of the cause which had brought the client to him. He was an entire stranger to the counsel, who had never seen him before; and, even supposing that the bargain was made before said counsel had an opportunity of seeing the papers in the attachment suits, yet it is established by the latter's testimony that, on the very day the second attachment was levied, on the 31st March, which circumstance induced Phillips to hasten to accept the offer and close the bargain, the bill of lading, taken *under a false name*, was assigned by him to the vendee, and that the assignment was signed by Phillips *under his feigned name*. Was not this a sufficient circumstance to put him on his guard? In the words of the judge *a quo*, was it not such as to put the most unsuspicious person on enquiry? What was Phillips' object in using a false name? to conceal himself and his property! He said, it is true, that he owed no debt but the two on which the attachment was issued; but who

could believe him? We understand how this business was carried on; the sum of \$800 was paid before the counsel, as he states, knew anything about the attachments; but he was aware that the attachments had been sued out; that the goods were in the sheriff's hands, and could not be taken out without security. William Haynes attempted to become surety without depositing the money, and when he signed the bond and deposited \$1,600, his brother was with him, and filled up the blanks. Then, at least, he must have had communication of the papers, and have become acquainted with the true position of Phillips; and why did he then complete the bargain, by paying the \$1,600? Why did he not withdraw from it, and claim back the \$800 already paid? It was because it was thought that the bargain was an advantageous one, and that the profits could be realized before any other attachment could issue. William Haynes resided in the upper part of the city, and the goods were taken to Amour street, in the Third Municipality. They were put in a small dwelling-house, and not in a store or warehouse, and Phillips disappeared immediately after the bargain was closed!

Without its being necessary to review again the evidence, we are satisfied under it, that F. Haynes and William Haynes were perfectly aware of the circumstances which compelled Phillips to part with his goods; that the purchase was made under very suspicious circumstances, from a man, who, with his feigned name, was unworthy to be trusted or to be believed. Nay, the false name which he bore in the bill of lading was enough to raise the greatest suspicion; and it seems to us clear, that the attorney at law who suggested the purchase, and his brother, who bought the goods, had sufficient, and even full notice that they were sold in fraud of the rights of the vendor's creditors.

The judge *a quo*, however, went too far in inflicting what he calls "the smallest punishment." Art. 1977 of the Civil Code says, that "*if the party with whom the debtor contracted, be in fraud, as well as the debtor, he shall not on annulling the contract, be entitled to a restitution of the price or consideration he may have paid, except for so much as he shall prove has inured to the benefit of the creditors, by adding to the amount of property applicable to the payment of their debts,*" &c. Here, it is proved, that \$1,600 went

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to the payment of Phillips' debts; and that sum was paid to release the two first attachments, which, if not released, would have necessarily occasioned a diminution of so much on the property subsequently attached. It is clear, therefore, that this sum inured to the benefit of the creditors, by being added to the amount of the property applicable to the payment of the debts on which all the attachments issued; and under the above provision of the law, which cannot be disregarded, it must be reimbursed to the purchaser, who, however, must also suffer a loss of the \$800 paid to the debtor. This is the only extent of the punishment inflicted by law, as it cannot go further than the sum paid to, or due from the fraudulent debtor to, or by the party with whom he contracted. The judgment appealed from must, therefore, be amended, so as to allow the intervenor the reimbursement of the sum of \$1,600, out of the proceeds of the sale of the property attached; and this is the only relief which the appellant is legally entitled to.

It is, therefore, ordered and decreed that the judgment of the Commercial Court, so far as it annuls the sale of the goods attached from Phillips to the intervenor, by dismissing the intervention on its merits, be affirmed; but it is further ordered and decreed, that the said intervenor do recover the sum of sixteen hundred dollars, to be paid to him out of the proceeds of the sale of the goods attached in the three suits; the balance of said proceeds to be divided between the three attaching creditors, according to law, and that the appellees pay the costs of this appeal.

(See order modifying this judgment, post p. 200.)

Lockett and Micou, for the plaintiffs.

F. Haynes, for the appellant.

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WILLIAM B. SKIDMORE v. ALFRED PHILLIPS.

APPEAL by the intervenor, W. Haynes, from a judgment of the Commercial Court of New Orleans, *Watts*, J.

SIMON, J. This case is one of those alluded to in that of *Barker and another v. Phillips*, just decided, and presents the same question under the same state of facts, and must have the same result.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court, so far as it annuls the sale of the goods attached from Phillips to the intervenor, by dismissing the intervention on its merits, be affirmed; but it is further ordered and decreed, that said intervenor and appellant do recover the sum of sixteen hundred dollars, to be paid to him out of the proceeds of the sale of the goods attached in the three suits, the balance of said proceeds to be divided between the three attaching creditors according to law; and that the plaintiff and appellee pay the costs of this appeal.

(See order modifying this judgment, *infra* p. 200.)

Lockett and Micou, for the plaintiff.

F. Haynes, for the appellant.

RICHARD H. MANNING v. ALFRED PHILLIPS.

APPEAL by the intervenor, W. Haynes, from a judgment of the Commercial Court of New Orleans, *Watts*, J.

SIMON, J. This is the third attachment case brought under our consideration, under the facts disclosed in the case of *Barker and another v. Phillips*, just decided, and it must be disposed of in the same manner.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court, so far as it annuls the sale of the goods attached from Phillips to the intervenor, by dismissing the intervention on its merits, be affirmed; but it is further ordered and decreed, that the said intervenor and appellant do recover the

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sum of sixteen hundred dollars, to be paid to him out of the proceeds of the sale of the goods attached, in the three suits, the balance of said proceeds to be divided between the three attaching creditors according to law; and that the plaintiff and appellee pay the costs of this appeal.

(See order modifying this judgment, *infra* p. 200.)

Lockett and Micou, for the plaintiff.

F. Haynes, for the appellant.

GRIFFIN BARKER and another v. ALFRED PHILLIPS.

WILLIAM B. SKIDMORE v. THE SAME.

RICHARD H. MANNING v. THE SAME.

On an application by Lockett and Micou, for the plaintiffs in these cases, for a re-hearing.

SIMON, J. This application is for the purpose of obtaining a modification of our judgment, in such manner as to give to the plaintiffs an opportunity of showing that the intervenor, in whose favor we decreed the reimbursement of the sum of \$1,600, to be paid to him out of the proceeds of the sale of the goods attached in the three suits, has not delivered to the sheriff all the goods subject to the attachments, and by him, said intervenor, purchased of the defendant; that a large portion of the said goods remained in his possession, and have been by him disposed of; and that, on a fair settlement and liquidation of the value of the goods kept by the intervenor, it will be found that he has been fully reimbursed the amount to which he is entitled under our judgment.

We were under the impression, from the testimony of one of the witnesses, that the goods attached were *all the goods* sold by the defendant to the intervenor, as the witness testified, that when the attachment was levied, Stewart Haynes said that the goods seized were "the goods belonging to Prentiss or Phillips, that came out in the ship Huntsville;" but on a re-examination of the record, we have been able to ascertain that *all the goods* purchased were not delivered to the sheriff, the intervenor hav-

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ing bought eleven packages of goods from Phillips, according to the bill of lading, and the attachments having been levied upon four boxes and some loose dry goods. Indeed, the evidence, so far as it goes, authorizes us to believe that the intervenor kept a large portion of the goods purchased in his possession. Stewart Haynes admitted that he had received eight packages. The witness, Powers, says, that "seven boxes were delivered to S. Haynes; there was some furniture left, worth about \$200; and it seems to us just that the intervenor should account for the value of the goods which he kept, as so much by him received on account of the reimbursement allowed him in our judgment; the balance, if any remain due, to be paid out of the proceeds of the sale of the goods attached.

The subsequent proceedings had in the court below for the sale of the property, are not before us; the evidence in the record as to the value of the goods kept by the intervenor and their quantity, is insufficient; and we think justice requires that these cases should be remanded for further proceedings for the purpose only of ascertaining the quantity and value of the goods left in the intervenor's possession and from which he has benefited, and liquidating the amount which, we think, should be first applied to the satisfaction of his claim, before his being allowed to receive any part of the funds proceeding from the sale of the goods attached.

It is, therefore, ordered and decreed, that our judgment, so far as it goes, remain undisturbed; and that these three cases be remanded to the court below for further proceedings, for the purposes set forth in the present opinion, according to law, and the principles above recognized.

Clark v. Hartwell. Thornhill v. Christmas.

DANIEL S. CLARK v. ELEAZER D. HARTWELL.

Where a party notified by his adversary to attend at a certain hour at a commissioner's office, for the purpose of taking the deposition of a witness, attends at the appointed hour, waits for half an hour without the commissioner's appearing, and leaves, and, after his departure, the commissioner arrives, and proceeds to take the deposition, it will be inadmissible on the trial.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Durant*, for the plaintiff.

W. S. Upton, for the appellant.

MARTIN, J. The plaintiff claimed the price which the defendant had agreed to pay for the construction of a tomb. The demand was resisted on an allegation that the work had been inartificially and unskilfully executed; and the defendant is appellant from a judgment thereon.

Our attention is arrested by a bill of exceptions to the opinion of the judge sustaining the opposition of the plaintiff to the reading of a deposition, on the ground that it was taken in his counsel's absence. It appears to us, that the court did not err. The plaintiff had been notified to attend at half-past nine o'clock, when his counsel came and staid half an hour, and left the commissioner's office, said commissioner not being present, the deposition being in fact taken after half-past nine o'clock. On the merits, the defendant did not make out his allegations, except as to unimportant parts of the work, and in a very trifling degree, on which the judge made an allowance of twenty dollars. A close examination of the record has not produced any conviction that we ought to interfere with the judgment.

Judgment affirmed.

JOHN THORNHILL v. RICHARD CHRISTMAS.

A creditor of a residuary legatee, or devisee, of one whose succession is being administered in another State, cannot attach specific property of the succession, while still in possession and under the control of the executor, and the estate not yet fully administered. The property must be considered as the executor's, for the purposes of his trust.

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Thornhill v. Christmas.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The plaintiff having obtained a judgment against the defendant, appealed from a judgment in favor of M. Caruthers & Co., whose answers, denying that they had any property in their possession belonging to the defendant, or owed him anything, were traversed.

Kane, for the appellant.

E. C. Mix and *T. J. Cooley*, for the garnishees.

BULLARD, J. This action was commenced by an attachment, and M. Caruthers & Co. were made garnishees, and, in reply to interrogatories propounded by the plaintiff, answered, that they owed the defendant nothing, and had no property belonging to him in their possession, or under their control. The plaintiff traversed these answers by a supplemental petition, and further interrogatories were propounded to Young, a member of the firm of M. Caruthers & Co. The controversy relates to the ownership of forty-eight bales of cotton, shipped by Thomas H. Christmas, as executor of the last will of D. L. Horn, late of the State of Mississippi, deceased, which, it is admitted, was the produce of the estate. The plaintiff alleges that his debtor, Richard Christmas, the defendant, having married a relative of Horn, who died leaving a child, he became tenant, by the curtesy of England, and entitled to the revenues of the estate devised to her. It is asserted, on the other hand, that Horn devised to Mary E. Christmas and William Hardeman Christmas, certain portions of his estate, after payment of his debts. That Richard and Mary E. Christmas had two children born of their marriage, to wit, William H., and Henry Hill Christmas. That Mary E. Christmas and William H., died after the devise. That the estate of Horn is still under administration, and is largely indebted, both by mortgage and otherwise. That there is still living a child of Mary E. Christmas, to wit, Henry H., who is the sole heir of his deceased mother and brother. That the cotton marked D. L. H. was consigned to the garnishees by the executor, and will belong to Henry Hill Christmas, as soon as Horn's estate shall have been fully administered.

A copy of Horn's will is in the record. It shows that, after

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some particular legacies, he says: "The residue of my whole estate, after it shall have been wound up by my executors, I hereby give and bequeath to my affectionate friends, Mary E. Christmas and her son William Hardeman Christmas, to be equally divided between them, share and share alike." He appoints Thomas H. Christmas his executor. This will appears to have been duly admitted to probate. It authorizes the executor to do every thing necessary for the settling up of the estate: "To sell at private sale, and give a fee simple, to lease out and dispose of, in any manner, which, in his discretion, may seem best for the benefit of my devisees, both real and personal property."

Such being the admitted facts, we are clearly of opinion, that even if the defendant were himself the residuary legatee, or devisee, instead of being the father of one of them and the husband of the other, and thus entitled, as he asserts, to the estate as tenant by the curtesy, yet his creditors would not be authorized to levy upon specific property belonging to the estate, while it is still in possession and under the control of the executor, and the estate not yet fully administered. The cotton shipped by the executor must be considered as his, for the purpose of paying debts, and is not subject to attachment for the debts of the defendant.

Judgment affirmed.

WILLIAM LINDLEY and another v. SAMUEL J. HAGENS.

THE SAME v. CYRUS GREEN.

Notice of the time and place of taking the deposition of a witness about leaving the State, left at the office of the attorney of record, during the absence of the latter from State, with a white person over fourteen years of age, is sufficient.

A non-resident debtor arrested under the 2d section of the act of 28th March, 1840, having been released on executing a bond, in pursuance of the first section of the amendatory act of the same date, with surety, the condition of which was that he should not depart from the State within three months without leave of the court, on a rule against the bail to show cause why he should not be condemned to pay the amount of the judgment, it was proved that the debtor had left the State within the three months, and that a *fi. fa.* against him had been returned *nulla bona*, but

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that he was present in court on the trial of the case, and offered to surrender himself in discharge of his bail, *Held*, that the offer to surrender cannot avail the surety, as, since the acts of 1840, no officer had authority to take the principal into custody on such surrender; and that the departure of the latter from the State, within the three months, and the return of a *fi. fa.* against him unsatisfied, fixed the liability of the surety.

APPEALS, from the District Court of the First District, *Buchanan, J.*

J. C. Clarke and *Preston*, for the plaintiffs.

Roselius and *R. H. Chinn*, for the appellants.

BULLARD, J. These two cases have been submitted together, and as one is supposed to depend in some measure on the other, it is agreed they shall be decided at the same time.

The first is an action against Hagens, to recover back from him a part of an advance made by the plaintiffs upon a lot of bacon shipped to New York, on the allegation that it sold for a considerable amount less than the sum of \$2,400, which had been advanced. In this action, Green, who is appellant in the other case, was the defendant's surety on the bail bond, taken in pursuance of the act of 1840 (See B. & C.'s Digest, 475. No. 16, sec. 1), and judgment having been recovered of the principal, and no property found, a rule was taken on the surety, and on proof that the principal had left the State within three months, and thus broken the condition of the bond, judgment was rendered against the surety, and he appealed.*

Our first enquiry, therefore, is, whether there be any error in the judgment against Hagens.

Among the points filed by the counsel for the appellants is one, that testimony was erroneously admitted; and thus, our attention is directed to two bills of exceptions in the record: the first to the admission of the testimony of Lindley, a going witness, taken before a city judge, objected to on the ground that it was taken without notice to the party. The record shows that notice of the time and place of taking the deposition was given, by leaving a written notice at the office of the attorney of record of the defendant, in the hands of a young

* Hagens appealed from the judgment against him.

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man over fourteen years of age, in the absence of Mr. Chinn.* This notice appears to us sufficient, and the court did not err in admitting the deposition.

The second bill shows, that a similar objection was made to the deposition of Gribble, taken before another city judge. The notice given by him, was served both at the dwelling-house and at the office of the counsel. The letters annexed to the deposition, from the consignees of the bacon in New York to the plaintiffs, were, perhaps, not legal evidence against the defendant, Hagens, and were offered only to rebut, after the defendant had closed his evidence; but if these letters were rejected altogether, it would not vary the result.

Upon the merits it is satisfactorily shown that the plaintiffs, who were the shippers of the bacon for the account of the defendant, and who had made the advance, paid their correspondents in New York, who it appears rendered an account of sales to the defendant himself, the difference between what the sales produced and the amount advanced by them on a bill drawn upon the consignment. We see nothing unfair in the transaction. It was the misfortune of the owner, who ordered the shipment, that the article had fallen in price, and was somewhat deteriorated in quality. The judgment must, therefore, be affirmed.

And this brings us to the second case, which is a rule upon the bail.

The order of arrest was obtained on an affidavit, as required by the act of 1840 (sec. 2, B. & C.'s Digest, p. 472), and the condition of the bond subscribed by Green was, that the defendant should not depart from the State within three months, without the leave of the court. The rule on the surety to show cause why he should not be condemned to pay the amount of the judgment against Hagens, is founded on the allegation that a writ of *fieri facias* had been returned *nulla bona*, and that the condition of the bond had been broken by the departure of Hagens from the State, within three months from its date. Green, the

* R. H. Chinn, Esq., the counsel, was absent from the State, and the notice was left with Mr. H. C. Chinn.

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defendant in the rule, filed a written answer, in which he admits the execution of the bond, but avers that Hagens, the principal, was present in open court upon the trial of the suit, and then and there surrendered himself in discharge of his bail, and of the obligation of the respondent; and that he has since remained within the jurisdiction of the court; and he further says, that if Hagens has been at any time temporarily absent from the State, no damage or injury has thereby accrued to the plaintiffs, and that the bond contains stipulations not authorized by law.

It is obvious that the plea, that Hagens had surrendered his person in discharge of his bail, cannot avail the surety, because, since the promulgation of the act to abolish imprisonment for debt, no officer had any authority to take him in custody on such surrender. The only remaining question on the merits is, whether the departure of the defendant from the State within three months, in violation of the condition of the bond, fixed the liability of the bail.

It is admitted by the defendant's counsel, that Hagens left the State, but returned after the three months had expired; and it is shown that he afterwards lived in Louisiana. The counsel urge that as the law stood previously, the condition of the bail bond was that the defendant should not depart the State without the leave of the court, and yet it had been ruled that such departure did not render the surety liable, but that he might discharge himself at any time before judgment against the bail, and was released by the death of the principal. This is true, but under that system the condition of the bond was essentially modified by articles 230 and 231 of the Code of Practice, which authorised the bail to discharge himself, by surrendering his principal to the sheriff at any time before his liability should be fixed by a judgment against himself; and for that purpose article 233 authorised him to take out a bail-piece, if the principal would not voluntarily surrender himself. The opinion of the court under that state of the law, was formed by taking all these provisions together. But at present there can be no surrender, and no bail-piece can be issued, in as much as the *capias ad satisfaciendum* has been abolished. The condition of the bond as presented by the statute is simply, that the defendant shall not

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leave the State without the leave of the court, and is not, in our opinion, controlled by any other provisions. "*Cessante ratione cessat et ipsa lex.*"

But it is further contended, with great plausibility, that according to this construction, the surety of a fraudulent debtor, arrested under the 10th section of the act of 1840, whose fraud is proved, is only liable for the debt in case the debtor shall have departed from the State; and that it can hardly be supposed the legislature intended to place the bail of the unfortunate, on the same footing as to the condition of his liability, with that of fraudulent debtor, and that no injury accrues to the creditor by the temporary departure of the debtor, provided he returns so that the creditor can proceed against him for a forced surrender. This argument would have greater force if the principal debtor was a citizen of the State, against whom proceedings might be taken for a forced surrender. It is only residents within the State, who, under the 4th section of the act, could be compelled to make a surrender. With respect to a non-resident, as the defendant Hagens was, such a bond would be quite nugatory, if it were not held to be absolutely forfeited by the departure of the principal, at least after a return of *nulla bona* on execution against the principal. When the law has not distinguished, we cannot. The bail of the fraudulent debtor is, perhaps, absolutely liable, without regard to the ability of the principal to pay the judgment against him.

It is, therefore, ordered and decreed, that both judgments be severally affirmed with costs.

WILLIAM LINDLEY and another v. SAMUEL J. HAGENS—APPLICATION FOR A RE-HEARING.

R. H. Chinn, prayed for a re-hearing in this case.

BULLARD, J. A re-hearing was allowed in this case, upon the suggestion of the counsel for the appellant, that he had not expected that the two cases would be decided at the same time; that he had consequently not done entire justice to his client in

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the argument of the case ; and that the court may have overlooked important matters of fact. We have, therefore, again attentively considered the evidence upon which the court below proceeded in giving judgment for the plaintiffs.

The bacon was shipped by the plaintiffs as the agents of Hagens, and an advance obtained by means of their bill upon the consignees, who were directed to render their account of sales directly to the owner. That was accordingly done. But as the plaintiffs had drawn for the advance, the consignees drew on them for the deficiency, and the bill was paid ; and the object of this action is to recover it back.

It is contended, that if Hagens' instructions had been obeyed, and immediate sales made, the loss would not have occurred. Upon this point it is shown that his orders were obeyed as far as they could be, considering the state of the market and the condition of the bacon. This is positively sworn to.

When the account was shown to Hagens, it appears, according to the testimony of one of the witnesses, that he said he would pay it if he had the money. He at the same time made some objections to the charges made by the house in New York, for wheeling, re-wheeling, scraping and smoking the bacon, and about a hogshead sold to a Frenchman who failed and paid only five dollars. All his objections were confined, says the witness, to the charges of the New York house ; but he admitted that he had received from that house an account of sales.

With the evidence before us in the record, even if this action were between the New York house and Hagens, to recover the difference between the advance and the proceeds of the bacon, we should not think ourselves authorised to reverse a judgment against the defendant, as clearly unsupported by evidence ; still less do we, when his agents here seek the reimbursement of a sum paid for him, when he made no objections on receiving an account of sales, and which he said he would pay if he had the money, notwithstanding some trivial objections to some of the charges, especially as he has his redress against the consignees in New York, if they have sacrificed his interests by violating his instructions.

Let our first judgment remain undisturbed.

The Union Bank of Louisiana v. Marigny and another, Executors.

THE UNION BANK OF LOUISIANA v. MANDEVILLE MARIGNY and another, Dative Testamentary Executors of Peter L. Sloane, deceased.

Under the 24th section of the act of 3d April, 1832, incorporating the Union Bank of Louisiana, the right of the bank to seize and sell property mortgaged to it for stock or loans, is not impaired by the death of the mortgagor; and the bank may proceed to enforce the sale of the property *via executiva*, where it has a title importing a confession of judgment, or, *via ordinaria*, by obtaining a judgment against the representatives of the mortgagor (C. P. 61, 63, 64), when it has no such title; and these proceedings, to avoid the delays and formalities from which it was the intention of the legislature to relieve the bank, must necessarily be before the ordinary tribunals, as a Court of Probates can issue no seizure and sale, nor *fi. fa.*, and can only order the sale of the property and payment of the debt in due course of administration. C. P. 986, 987, 990, 991, 993.

The words "*according to law*," in the 24th section, refer to the seizure and sale authorized by that section, and mean that all the requirements of the law as to notice, appraisement, advertisement, &c., must be complied with—not that payment must be sought in the Probate Court, concurrently with the other creditors of the deceased. If the proceeds of the sale of the mortgaged property should not pay the whole claim, the bank must go into the Court of Probates for the balance, and, if the claim should not be admitted, sue the representatives of the deceased in that court; and this, whether the original proceedings were *via executiva*, or *via ordinaria*.

APPEAL from the District Court of the First District, *Buchanan, J.*

Denis, for the plaintiffs.

G. Strawbridge, for the appellants.

MORPHY, J. The New Orleans Gas Light and Banking Company, alleging themselves to be aggrieved by a judgment rendered in this case, took a rule on the plaintiffs and defendants, to show cause why they should not be allowed to appeal therefrom. On their showing that they held a note of the deceased for \$1,926 30, bearing mortgage on certain lots of ground that had been sold under said judgment, the appeal was granted. The record shows that, in April, 1840, P. L. Sloane became a stockholder of the Union Bank, by the purchase of one hundred and fifty shares of its capital stock, together with the above mentioned lots on which the stock rested, and which were mortgaged to secure it; that having assumed the obligations of the original stockholder, he furnished his own stock note for \$4,875,

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payable on the 1st of March, 1841; and that on his failure to pay the instalments which have since become due, the present suit was brought by the bank against his executors to obtain a judgment, in order to seize and sell the stock and mortgaged property. Judgment was obtained in due course of law, and the property was seized and sold. There being a surplus of \$1,284 59 in the hands of the sheriff, after paying the bank, this balance was paid over to the executors on their demand, to be distributed in the Court of Probates of the parish of Orleans, where the succession had been opened. It is urged by the appellants that the whole proceeding had in the District Court is null and void for want of jurisdiction, as under article 924 of the Code of Practice, the Court of Probates has exclusive jurisdiction to order the sale of succession property administered by executors or administrators, and to decide on claims for money which are brought against successions so administered. This position would undoubtedly be correct in the case of an ordinary mortgage creditor; but the question is, whether the plaintiffs, under their charter, were not authorized to proceed as they have done. The 24th section of it (Acts of 1832, p. 62) provides, that "the Union Bank shall have the right to cause to be seized and sold according to law, the property mortgaged, in whose hands soever the same may be found, *in the same manner, and with the same facilities as if it was seized in the hands of the mortgagor*, notwithstanding any sale, or change of the title thereof, by *inheritance* or otherwise." The 27th section provides: "That if any individual who shall have obtained from the said bank a loan secured by mortgage, as aforesaid, shall make a voluntary or forced surrender of property to his creditors, the said mortgaged property shall not be comprised in the cession, or in the mass of his estate, except in case of payment of the sum due to the bank, and secured by said mortgage; but the said bank may proceed by an order of seizure and sale against the said property in the same manner as if no surrender had been made, and the surplus of the proceeds of the sale, after paying the debts due to the bank, with costs, shall be paid over to his legal representatives." From these, and other provisions of the charter, it is manifest that, in view of the interest

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which the State had in the welfare of this institution, in whose favor its bonds were to be issued, the legislature intended to confer upon it peculiar privileges, and great facilities in the collection of its claims. Thus, notwithstanding the death or bankruptcy of the mortgagor, or sale of the property mortgaged, it may be proceeded against by the bank in whatever hands found, in the same manner as if yet in the hands of their debtor, The plaintiffs then finding the property subject to their mortgage in the hands of the defendants, brought this suit against them, as they could have done against their debtor in the District Court. Had they gone into the Court of Probates, as it is concluded they should have done, they could not have *caused the property to be seized and sold in the same manner, and with the same facilities, as if it was seized in the hands of the mortgagor.* The judge of that court, which is one of limited jurisdiction, would not, and could not have issued an order of seizure and sale, nor could he have issued a *feri facias* under a judgment by him rendered. In pursuance of the Code of Practice, he must have ordered the sale of the property to be made, and the debt to be paid in due course of administration, thus subjecting the plaintiffs to all the delays and formalities which it was the object of the law to relieve them from. Code of Practice, arts. 986, 987, 990, 991, 993. It is said that the words, "*according to law,*" used in the 24th section, mean that, in case the debtor dies, the bank must proceed in the manner pointed out by law, and must seek their payment in the Court of Probates concurrently with the other creditors of the succession. These words we understand to refer to the seizure and sale authorized to be made; that is, that all the requirements of the law must be complied with in regard to notice, appraisalment, advertisements, &c., in such seizure and sale. The construction contended for would render the section a dead letter. It would do away with the privilege and right of seizing intended to be given, notwithstanding the death of the mortgagor, and would place the bank upon the footing of any other mortgage creditor. It is insisted, that the only effect of the 24th section of the charter, is that of the pact *de non alienando* in a contract of sale. We think that it is something more. Such a stipulation in a

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sale is of use or value to the seller, only in case the buyer sells the property. As long as it remains in his possession, the rights of the seller are the same as if no such clause existed. If the buyer dies he can no longer cause the property to be seized and sold, but, like all the other creditors of the deceased, he must seek his payment in the Court of Probates; and a sale made under the authority of that court, will have the effect of raising his mortgage, and transferring the rights he had on the property to its proceeds in the hands of the administrator of the estate. Under the 24th section of the charter, the right of the bank to seize and sell the property mortgaged to it, is not impaired by the death of the mortgagor; and if they do not exercise their right, no sale under the order of the Court of Probates can have the effect of raising their mortgage. *Williams v. The Bank of Louisiana*, 17 La. 384. To exercise their right to seize and sell the property subject to their mortgage, the bank could, in our opinion, go before any court where they could have proceeded against the mortgagor himself. But it is urged that, admitting their right to do so, the bank have not sued out an order of seizure and sale against the property, but have brought their action in the ordinary form, and have demanded a judgment against the executors with mortgage on the property. The hypothecary action, which has for its object to seize and sell property mortgaged to secure a debt, can be exercised in two ways: *via executiva*, when the title of the creditor imports a confession of judgment, or, *via ordinaria*, when the creditor has no executory title against his debtor, as was the case with the bond of Sloane, on which this suit was brought. In the latter proceeding a judgment must be obtained against the debtor in the usual form, before the property can be seized and sold. Code of Practice, arts. 61, 63, 64. But both proceedings tend to, and bring about the result authorized by the charter, to wit, the seizure and sale of the property. It brought a sum more than sufficient to satisfy the bank, and the balance was paid over to the representatives of the estate; but if it had not brought enough to pay the whole claim, the bank would have had to go into the *concurso* in the Court of Probates, for the balance. If their claim had not been admitted, they would

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have had to bring suit against the executors in that court for such balance. The judgment of the District Court could have availed them only so far as it rendered their title executory, and authorized the seizure and sale of the property mortgaged. By pursuing the *via ordinaria*, the bank could have obtained, and has obtained nothing more than if they had sued out an order of seizure and sale under a title authorizing that summary proceeding.

Judgment affirmed.

WILLIAM KRÆUTLER and another v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES.

The evidence of a witness who states, that he verily believes that notice of the neglect or refusal of the acceptor to pay a bill at maturity was given to the drawer, but does not say how it was given, nor assign any reason for his belief, nor state any fact from which the court may judge of the sufficiency of the notice, is not sufficient proof of notice.

A non-resident may appeal at any time within two years from the day on which final judgment was rendered; and where the plaintiffs allege in their petition and affidavit for an attachment, that the defendants reside out of the State, they will be concluded thereby.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

GARLAND, J. The plaintiffs, as holders, sue on an inland bill of exchange, purporting to have been drawn in London, by S. Jaudon, attorney of the Bank of the United States, to his own order, on the 22d of October, 1841, on Gen. C. F. Mercer, attorney of the Union Bank of Florida, then in London. The bill is for £7,215 sterling, accepted by the drawee, payable at the house of the plaintiffs, on the 1st May, 1842. The bill was not paid at maturity, and the plaintiffs allege that it was duly presented for payment, protested, and that notice was given to the drawer. They also allege that the said drawer and endorser were not entitled to the notice of protest, as the defendants had no funds in the hands of the acceptor, at the place of payment, to meet the bill, nor had the drawer authority to draw said bill. The petition, after other allegations, prays for an

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attachment, the citation of various garnishees, and for a judgment for the amount of the bill or draft, with interest and damages. The answer of the defendants is a general denial of all the allegations. The garnishees also answered, but it is not now necessary to notice what they say.

On the part of the plaintiffs, the depositions of two witnesses residing in London, were offered. Huston, one of them, who is a clerk of the plaintiffs, swore that he had examined the copy of a bill of exchange annexed to the commission, drawn by S. Jaudon, attorney for the Bank of the United States, and accepted by Mercer, attorney of the Union Bank of Florida, "and that he doth believe verily, payment of the same was demanded of the said acceptors, on the 4th day of May, 1842, at the counting house of the plaintiffs, by a notary public, or by his clerk; that he doth verily believe, protest for non-payment of the said bill, was duly made by the said James Comerford, notary," &c. That with reference to the question of notice of dishonor and protest of said bill, "he believes that the drawers thereof were made acquainted with the dishonor thereof at the time, or, if not, yet they subsequently waived such notice, and admitted their liability to the amount of the said bill," because, he says, the plaintiffs have in their possession, a letter, known to him (witness) to be in the proper hand-writing of the said Samuel Jaudon, signed by him, dated sometime after the said bill became due, and addressed to plaintiffs, wherein, Jaudon states that, "shortly after I wrote to you in February, I went to New Orleans, when I received a letter from Col. Gamble, to whom I had written on the subject of the debt of his bank in London, informing me that Gen. Mercer had left Tallahassee, on his way to London, where he would see all the parties interested, and give them full explanations about the means and prospect of payment. It appeared to me, therefore, unnecessary for me to write you respecting your advances to the Union Bank of Florida, guaranteed by the Bank of the United States, (meaning and thereby intending, as this deponent believes verily, amongst other things, the said bill for £7,215), as I could add nothing to what General Mercer could say. From the Bank of the United States there is no prospect of any dividend for a long time. I am,

therefore, most desirous that some satisfactory arrangement should be made by the Union Bank, and most cheerfully will I give all the aid in my power towards accomplishing this object." The witness further states, that before, and down to the end of November, 1841, Jaudon acted, and was well known in London, as the general agent and attorney of the Bank of the United States, and Mercer was also well known as the general agent of the Union Bank of Florida. The bill, with others, was given to secure the plaintiffs for an advance or loan made, or to be made by the plaintiffs to the Union Bank.

Boyle, the other witness, swears that, as the clerk of Comerford, the notary, he demanded payment of the bill; but he does not know whether any notice was given to the drawers and endorsers of the protest. He further says, that the laws of England in relation to bills of exchange are generally correctly stated in the treatise of Mr. Chitty on that subject.

We have stated fully all the evidence which the voluminous record contains, in relation to the drawing, endorsing, acceptance and delivery of said bill, and the notice of protest. It is unnecessary to state all the other matters detailed by the garnishees, and the evidence in relation to them, as we are satisfied that the judgment appealed from must be reversed.

There is no principle of law better settled than the one which declares, that the holder of a bill of exchange must, to enable him to recover against the drawer, prove a notice having been given to the latter of the neglect or refusal of the acceptor to pay the bill at maturity, or that some of the causes which excuse a want of notice really exist. In the case before us, there is not sufficient evidence of notice to the drawer, nor any proof of the case being an exception to the general rule. The clerk of the notary says, that he made the demand of payment, but he does not know whether any notice of protest was given or not. Huston, the plaintiffs' clerk, says he "verily believes" that notice was given, but he does not state any reasons for his belief, nor say in what manner it was given. He states no fact upon which we can form an opinion as to the sufficiency of the notice. It may be true, as the witness "verily believes," that a notice was given, yet it may have been given in an illegal man-

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ner, or at an improper time, and be insufficient to bind the drawer. We have often said that we expect witnesses to state facts, not opinions. If they do state their belief, the circumstances and *data* must be given, that the court may judge whether the belief is well founded, reasonable and probable.

The attempt to prove a promise, since the maturity of the bill, to pay it, has entirely failed. In the first place, the letter alluded to by the witness contains no promise to pay at all, and, if it did, it is not shown that Jaudon, at the date of it, had any authority to bind the bank. According to the plaintiffs' witnesses, his authority expired in November, 1841. The bill was not payable until 1st—4th May, 1842, and the pretended promise was subsequent to that date.

We can only account for a judgment being given for the plaintiffs upon such testimony, by supposing that the attention of the court below was never particularly called to it; and that the numerous other questions which the case presented with other parties, kept the real merits out of view as between the original parties.

The plaintiffs' counsel has moved to dismiss the appeal taken by the defendants, on the ground that one year had elapsed from the date of the same. It is shown by the record, that the bank is a non-resident, being a corporation located in another State, and has, under art. 593 of the Code of Practice, a right to appeal within two years. This answer to the motion to dismiss, appears to us conclusive. The plaintiffs, in their petition and affidavit, say that the President, Directors and Company of the bank reside out of the State of Louisiana, and on that ground claim an attachment against them. They cannot now recal their allegations, and deprive the appellants of their right to appeal.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be annulled and reversed, and ours is in favor of the defendants as in case of non-suit; the plaintiffs paying the costs in both courts.

Peyton and I. W. Smith, for the plaintiffs.

T. Slidell, for the appellants.

Kräutler &c. v. Bank of the United States. Citizens Bank of Louisiana v. Brothers.

WILLIAM KRAUTLER and another v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Peyton and I. W. Smith*, for the appellants.

T. Slidell, contrâ.

GARLAND, J. This appeal arises out of the case of *Kräutler and another v. The Bank of the United States*, just decided. It was taken from two judgments of the court—one in favor of Andrew Morrison, sustaining his exceptions and dismissing him as a garnishee; and the other discharging a rule taken on Robert Copland, to show cause why a judgment should not be given against him as a garnishee.

The whole foundation for the demands of the plaintiffs having been broken up and destroyed by the judgment given between the plaintiffs and defendants, we see no utility in pursuing the garnishees.

Appeal dismissed.

THE CITIZENS BANK OF LOUISIANA v. WILLIAM BROTHERS.

No appeal will lie from a judgment on an opposition by a third person, claiming to be paid by preference to the mortgage creditor out of the proceeds of property sold under an order of seizure and sale, where the amount claimed by the opponent is only three hundred dollars, though the claim for which the order of seizure and sale was issued exceeded that amount.

APPEAL from the Parish Court of New Orleans, *Maurian, J.*

Pitot and Denis, for the appellants.

Lockett and Micou, contrâ.

MARTIN, J. The bank is appellant from a judgment which sustains the claim of Dr. Kennedy to three hundred dollars, for professional services to its deceased mortgage debtor, in his last illness, out of the proceeds of the sale of the mortgaged premises in the hands of the sheriff.

The bank complains of the judgment as a violation of their charter, which authorizes them to proceed to the sale of property

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mortgaged to it, notwithstanding any alienation thereof, or change of possession by succession, or descent to heirs, or legatees by last will and testament, or otherwise, in the same manner as if the same was in possession of the original mortgagor.

The appellee has prayed for the dismissal of the appeal, on the ground that the amount involved in his claim does not exceed three hundred dollars, and that a third opposition is a distinct suit. This is resisted by the appellants, who show that their claim exceeds considerably the sum of three hundred dollars, all of which they might lose if there were a number of third oppositions of three hundred dollars each, the aggregate amount of which would exceed its demand.

The judgment being for three hundred dollars only, and not more than that sum having been demanded, we are of opinion that we have not jurisdiction of the case.

Appeal dismissed.

JEAN HERMANN RABOTEAU v. OSCAR VALETON.

A sheriff or marshal is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases.

The right given by the 13th section of the act of 20th March, 1839, to a plaintiff who has applied for a writ of *fi. fa.*, to propound interrogatories to a third person believed to have property or effects under his control belonging to the defendant, or to be indebted to him, can only be exercised so long as the writ remains in the hands of the sheriff.

APPEAL from the City Court of New Orleans, *Collins, J.*

SIMON, J. The record shows that, the plaintiff having obtained judgment against the defendant for a certain amount with interest, a writ of *feri facias* was issued on the 25th of November, 1844, on the back of which, the city marshal made the following return: "Received, November 25, 1844, and on the 11th of December, executed the within writ, *by seizing in the hands of Daquin brothers, all sums of money, rights or credits, and property belonging to the defendant, to an amount sufficient to satisfy the*

debt and costs." The writ was returned on the 4th of January, 1845.

On the 31st of the same month, on the motion of the plaintiff, *Daquin brothers* were ordered to answer, under oath, certain interrogatories, propounded for the purpose of ascertaining the amount which they might owe to the defendant, which interrogatories were not answered, and judgment was rendered against them as garnishees, for the whole amount of the judgment originally rendered against said defendant.

A few days after this judgment was rendered, the garnishees obtained a rule on the plaintiff to show cause why it should not be set aside, on three grounds, the first of which is the only one insisted on below, to wit, that the proceedings under which the garnishees were cited are irregular and null, as there was no petition served on them, and no writ of *feri facias* in the hands of the sheriff when they were cited as garnishees. The rule was discharged, and the garnishees have appealed.

This appeal is taken from the two judgments, and the only question which the case presents is, whether the appellants could be compelled to answer the appellee's interrogatories, and have been legally made liable to pay the amount due by the defendant?

We have already noticed that, at the time when the interrogatories were propounded to the appellants, there was no writ of *feri facias* in the hands of the marshal, the same having been returned about twenty-seven days before. The return shows that the writ had been executed, by seizing in the hands of said appellants, all sums of money, rights, credits, &c. belonging to the defendant; but it does not specify the nature of the rights, credits and property which were seized, and nothing shows that the garnishees were ever notified by the marshal of the levy of the writ on any thing they might have had in their hands belonging to the defendant. Was this a seizure, would be the first question presented in an ordinary case in which the effect of the levy should be contested, and might perhaps be answered in the negative, as, although the object said to have been seized was an incorporeal right, which the marshal could not take possession of, it was perhaps necessary that the amount seized

should be known, and the nature of the property ascertained, in order to enable him to proceed according to law in disposing of the property seized under the writ which he had in his hands; for, if he could not ascertain the amount on which he intended to levy the writ, in the hands of a third person, by calling on said third person to declare it, the plaintiff in the execution would become then entitled to proceed according to the law of 1839, for the purpose of fixing the levy upon a specific sum or thing, and of ascertaining the nature of the right, credits or other property upon which the levy might be made. Here, the writ was returned about twenty-four days after this irregular levy, and it does not appear that any further step was taken by the sheriff, nor any proceeding had in the mean time to make it effectual, either by making the necessary enquiries as to the reality or existence of the amount and property seized, or by resorting to the remedy pointed out by the law of 1839, previous to returning the writ.

It is a general principle, repeatedly recognized, that a sheriff, or marshal, is no further the agent of a plaintiff in execution than such authority is derived from the writ placed in his hands; and that the instant it is returned into court, the authority of the officer ceases. See 2 La. 280. 1 Rob. 540. 2 Ib. 341. And the case of *Cochrane et al. v. Bank of the United States*, ante p. 64. Here, as we have already said, the levy was perhaps irregular and ineffectual; but without considering that, it will suffice to examine the law of 1839, under which the proceedings complained of were had, to be satisfied that the appellee could not resort to the remedy therein pointed out, unless a writ of *fi. fa.* was in the hands of the marshal at the time the interrogatories were propounded, or, at least, unless he had applied for one upon which his proceedings should be based. In the case of *Simpson v. Wiltz et al.* decided in May, 1844, we explicitly held that the right given by the 13th section of the law of 1839, (B. & C.'s Dig. p. 458), could only be exercised when the plaintiff in a cause has applied for a writ of *fi. fa.*; and that such plaintiff is entitled to the remedy therein provided for, only as long as the writ remains in the hands of the sheriff. The provisions of that law indicate clearly that such was the intention of the

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law maker, for, after having pointed out the proceedings necessary to obtain the answers of the garnishee to the interrogatories, to be in the same manner as are provided for in relation to garnishees in cases of attachment, and the effect of his neglect or refusal to answer, the law goes on to say: "In case the third person shall confess in his answers that he has property or effects in his possession, or under his control, belonging to the defendant, or is indebted to him in any sum of money, the court shall order him forthwith *to deliver up said property, to pay such sum to the sheriff, &c.*, and the property and effects, in the possession of a third person, belonging to the defendant, or debts due by him to such defendant, shall be decreed *to be levied as by the sheriff* from the date of the service of the interrogatories on such persons." Thus, it seems to us clear, that the proceedings to be had under the law of 1839, are the necessary consequence of the placing of a writ of *fi. fa.* in the hands of the sheriff, and that the property and effects, or the sum of money found in the possession of the garnishees as belonging to the defendant, and which are to be delivered up to the sheriff, cannot be *levied on*, unless said sheriff has in his hands a writ of execution from which he derives his authority to act, and to the satisfaction of which the property levied on, or the money received, is to be applied. We are of opinion that the proceedings complained of are irregular, and that the appellants cannot be made liable under them.

It is, therefore, ordered and decreed, that the judgment of the City Court be annulled, and reversed, and that the rule obtained by the garnishees and appellants be made-absolute, with costs in both courts.

Raboteau, plaintiff, *pro se.*

Bodin, for the appellants.

Wellington and another v. The Merchants' Insurance Company of New Orleans.

**ALFRED WELLINGTON and another v. THE MERCHANTS' INSURANCE
COMPANY OF NEW ORLEANS.**

To render one of the original parties to a policy of insurance, alleged to have assigned all his interest therein for the benefit of his creditors, competent as a witness for the other insurers in an action on the policy, the acceptance of the assignment by all the creditors must be proved, where the assignment, stipulating the release of the debtor, is not so manifestly for their benefit, that their acceptance can be presumed. Nor will such a witness be rendered competent by the execution, in open court, of an instrument abandoning all his interest in the policy for the benefit of his creditors. *Per Curiam*: He is still interested that the creditors who have not released him should receive a part of the amount sued for; and he cannot release himself.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
BULLARD, J. The plaintiffs sue upon a policy of insurance against fire, taken out by A. & G. H. Wellington & Co. on their stock of goods, consisting of a general assortment of groceries, oils, liquors, &c., being either on own account, on commission, or held in trust, contained in a brick store occupied by the assured, situated No. 44 New Levée street, Second Municipality. They allege a loss by fire to the amount of \$25,000, of which they gave due notice, and exhibited proper preliminary proof, and they sue for the amount insured by the defendants, to wit, \$7,500.

The defendants admit that they subscribed the policy, but they deny all the other allegations in the petition. They say especially that, even if the said plaintiffs were entitled to any relief under and by virtue of the policy, which they deny, yet such right would have been forfeited by reason of this, which they specially aver, to wit, that the said plaintiffs have been guilty of fraud in demanding of this company an amount far beyond any loss or damage actually sustained by the said plaintiffs; and that said excessive demand and over estimate were made knowingly, and with intent to defraud the defendants. They aver that the conduct of the plaintiffs both before and since the alleged conflagration was fraudulent. They say also that if the respondents should be condemned at all, they should receive the benefit of the fact of any other insurance having been effected on said property, if any there were. They deny the perform-

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ance of all and singular the conditions of the policy, and the verity of the representations therein contained.

The plaintiffs recovered in the court below the amount demanded, and the defendants appealed.

Under the pleadings, and all the circumstances disclosed in this case, the judge of the Commercial Court gave judgment for the plaintiffs with evident hesitancy and reluctance; and this, among other reasons, has induced us to look particularly into the evidence, especially as it relates to the amount of the merchandize really destroyed, it being distinctly alleged that the plaintiffs have been guilty of fraud in demanding an amount far beyond what they really lost. This defence rests upon the 9th article of the policy, which requires of the assured to deliver a particular account of losses or damage, signed with their hands, and verified by their oath, and, if required, by their books of account and other proper vouchers, &c.; "and if there appears any fraud or false swearing, the claimant shall forfeit all claim by virtue of the policy."

The evidence on this point is not entirely satisfactory to this court, especially as we are of opinion that Elbridge G. Wellington, one of the original parties to the policy, was not shown to be a competent witness, and that the bill of exceptions taken to the ruling of the court in admitting him to be sworn, was well taken. The acceptance of the assignment is not sufficiently proved, and the renunciation executed by the witness in open court on the 31st of May, 1843, abandoning all interest in the policy for the benefit of his creditors, and those of Stevens & Wellington, does not show that he was without interest. He has an interest that those creditors who have not given him a release should receive a part of the loss, to be recovered in this case of the underwriters, and he cannot release himself. The assignment is not of such a character, so manifestly for the benefit of the creditors, as that their assent may be presumed.*

As we have come to the conclusion that justice requires this case to be remanded, we abstain from any commentary upon the evidence given on the first trial.

*The assignment, among other stipulations, provided for the release of the debtor.

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Wellington, &c. v. Ocean Insurance Co. The Same v. Firemen's Insurance Co.

The judgment of the Commercial Court is, therefore, reversed; and it is further ordered, that the case be remanded for a new trial with directions to the judge not to admit E. G. Wellington as a witness, without sufficient legal evidence of his interest having been released, and not to admit the assignment without like evidence of its execution and acceptance; and that the plaintiffs pay the costs of the appeal.

Peyton, I. W. Smith and L. C. Duncan, for the plaintiffs.

T. Slidell, for the appellants.

ALFRED WELLINGTON and another v. THE OCEAN INSURANCE COMPANY.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. This case presents, among others, the same question as to evidence, which arose in the case just decided of the same plaintiffs against the Merchants' Insurance Company, and must be decided in the same way.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be reversed, and that the case be remanded for a new trial, with directions as set forth in the case last mentioned; and that the costs of the appeal be paid by the appellees.

Peyton, I. W. Smith and L. C. Duncan, for the plaintiffs.

F. B. Conrad, for the appellants.

ALFRED WELLINGTON and another v. THE FIREMEN'S INSURANCE COMPANY of NEW ORLEANS.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD, J. This case turns upon the same bill of exceptions as the two last, brought by the same plaintiffs against the Merchants' and the Ocean Insurance Companies. The same judgment must be given.

It is, therefore, adjudged and decreed that the judgment of

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the Commercial Court be reversed, and that the case be remanded for a new trial, with directions to the judge as set forth in the case against the Merchants' Insurance Company, and that the costs of the appeal be paid by the plaintiffs and appellees.

Peyton, I. W. Smith and L. C. Duncan, for the plaintiffs.

Durant, Lockett and Micon, for the appellants.

JOHN FITZ MILLER and another, Syndics of the creditors of said Miller, v. ANTOINE MICHOD and another.

Property not subject to alienation cannot be mortgaged. C. C. 3256.

Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged.

APPEAL from the District Court of the First District, *Buchanan, J.*

Lockett and Micou, for the plaintiffs and appellees.

Roselius and Soulé, for the appellants.

SIMON, J. This case presents the following facts: On the 9th of May, 1829, an authentic act was executed by which the late Nicholas Girod agreed to lease to John F. Miller, for the term of twenty years, a certain lot of ground, situated in the faubourg St. Mary, being the square bounded by New Leveé, Girod, Tchou-pitoulas and Notre Dame streets, for the annual rent of \$3000; and it is therein stipulated that, at the expiration of the lease, (9th of May, 1849,) "*Ledit sieur Girod, et ses héritiers ou ayans cause rentreront dans la possession et jouissance du dit lot de terre et des édifices y construits; et à cette époque, toutes les batisses et améliorations, de quelque nature qu'elles soient qui existeront sur le dit*

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lot de terre deviendront la propriété incommutable du dit sieur Girod et ses héritiers, sans aucune compensation pour les dites batisses, &c." Miller, however, does not obligate himself to erect any building on the property during the continuance of the lease. The contract contains also the following clause: "*Et dans le cas où la dite rente ou loyer de \$3000 ne seroit pas régulièrement payé le neuf Mai de chaque année à compter de neuf Mai, 1830, alors le sieur bailleur aura le droit de vendre, ou de faire vendre pour effectuer le dit paiement, telle portion des batisses qui aura été désignée par le preneur, pourvu qu'elle soit d'une valeur suffisante pour satisfaire la somme ainsi due par le preneur; le dite sieur Miller consentant que le present acte emporte avec lui exécution parée et soit revêtu de toute la force d'un jugement en dernier ressort."* Thus we understand from this contract that, at the end of twenty years, the landlord is to re-take the possession and enjoyment of the premises and of the buildings erected thereon, and that, at that time, all such buildings are to become his property, without his being bound to compensate the lessee for the value of the improvements.

The lessee took possession of the lot under the lease, and erected thereon eight two story brick buildings fronting on Girod street. On the 2d of November, 1840, he sold one undivided half of his interest in the lease and buildings to a third person, subject to the rights of several under tenants, and with the benefit of any buildings and improvements erected thereon by the latter; and, at other periods, executed mortgages on the other half, in favor of Samuel H. Turner, to secure the payment of \$7,592 74, with interest, and of Joseph Fowler to secure the payment of \$10,000, with the same interest.

The lessee made a surrender of his property to his creditors and, on the 6th of June, 1842, his undivided half of the eight brick houses and lease was sold by his syndics at public auction, and adjudicated to the executors of the lessor for the sum of \$11,200 cash. The executors pretended that the price of the adjudication should be compensated by a claim against the insolvent's estate, due to Girod's succession, for arrears of rent and taxes, amounting to upwards of \$17,000, on their giving bond and security to contribute to the payment of debts having a preference

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over them. This was refused by the lessee's syndics, and objected to by the mortgage creditors. The syndics retained possession of the premises, and a suit was brought by them against the lessor's executors for the amount of the adjudication. The syndics subsequently filed a tableau of distribution, which was opposed by the executors, on the ground that their claim was superior to that of the pretended mortgage creditors. The suit and the opposition were, by consent of parties, consolidated; and, after a full investigation of the respective rights of the parties under the lease and acts of mortgage, the judge *a quo* decided that the executors' claim for rent and taxes should have the preference over the pretended mortgage debts claimed by Turner and Fowler, to be paid out of the proceeds of the sale of the premises leased and of the moneys collected and to be collected of under tenants, and ordered the executors to be put in possession of the property; and from this judgment, the mortgage creditors and the syndics have appealed.

From the facts above stated, and the pleadings of the parties, it appears that the objection made by the syndics to allow the compensation claimed by the executors, is founded on the pretence that the premises, or their proceeds are not subject to the privilege on which the right of compensation is based; and that the mortgage creditors ought to have the preference on said proceeds. Hence the first question which presents itself for our consideration and solution, is, whether the right of the lessee to the buildings and lease, was susceptible of being mortgaged?

That is a question of considerable importance, and although, from the stipulations contained in the contract of lease, the parties thereto may appear to stand towards each other in a peculiar situation, in relation to the property upon which third persons pretend to have acquired subsequent rights, we shall first examine it according to the general principles of law which may govern a case of this nature, without the stipulation upon which the appellees rely.

It will be conceded that under art. 3256 of our Civil Code, the following objects *alone* are susceptible of mortgage: 1st. *Immovables subject to alienation*, and their accessories considered likewise as immovables. 2d. The usufruct of the same descrip-

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tion of property, with its accessories. 3d. Slaves. And 4th. Ships and other vessels. Thus it is clear that, if the property on which the right of mortgage is pretended to exist, is not subject to alienation, it cannot be mortgaged. Here the parties stand towards each other in the relation of landlord and tenant. On the one hand, the landlord has the *dominium directum*, and the tenant, on the other hand, has the *dominium utile* of the premises. This *dominium utile*, which is nothing but the right to enjoy and possess the property, cannot be mortgaged, unless it come within the second denomination of the objects susceptible of being mortgaged, to wit, the usufruct of immovable property; but the right to mortgage does not extend further than the usufruct itself, and it has no application to any other property to which the mortgagor has no direct title, or has only a precarious one. So, if the lot which was leased in this case to the insolvent, had never been improved, it is obvious that he could never have granted any mortgage upon it, although, under the lease, he might be said to have the *dominium utile*. The ownership of the lot, or of the soil, was in the lessor, and by him alone could it be alienated, and consequently mortgaged. Durantou, Vol. 19, No. 266, says: "*Quoique les droits d'usage et d'habitation résident sur des immeubles, et qu'ils aient beaucoup d'affinité avec le droit d'usufruit, néanmoins ils ne sont pas susceptibles d'hypothèque,*" &c. So should it be with regard to the rights resulting from a lease of immovable property, although the lease itself may be sold or transferred.

Now it is one of the well known principles of our laws, that "the property of the soil carries with it the property of all that which is directly above and under it" (C. C. art. 497); that all the constructions, plantations and works, made on or within the soil, are supposed to be done by the owner and to belong to him, unless the contrary be proved (art. 498); and that although such constructions and works have been made by a third person, with his own materials, the owner of the soil has a right to keep them, and they are acquired by him by virtue of the right of accession, on reimbursing to the owner of the materials, their value and the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

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Civil Code, art. 500. Under these principles, is it not obvious that, if a lessee of a naked lot erect houses upon it with his own materials, the buildings, presumed to belong to the owner of the soil, would only give him, the lessee, the right, at the expiration of the lease, to claim of the lessor the value of the materials and the price of the workmanship? The buildings would be his only in this sense, that he would have the *dominium utile* of the whole premises during the lease, and would be entitled to a legal compensation for the improvements from the owner of the soil at its expiration. But as he could not deprive the owner of the right given him by art. 500, above quoted; as he would be bound to consider the buildings as belonging to the lessor, subject only to the said compensation, how could he alienate them? What title to the said buildings could he transfer to another? The same kind of title which he has, to wit, the right of claiming the compensation or of taking the buildings away, if the owner did not choose to keep them; and surely this kind of right is not susceptible of being mortgaged.

Art. 455 of our Code, referred to by the appellants' counsel, says that buildings, or other constructions, whether they have their foundations in the soil or not, are immovable by their nature. This is true, but they are immovable only in relation to the soil, with regard to the owner of the soil; but not in relation to the owner of the materials with which they have been erected. We have just now demonstrated the extent of the right of the latter; they are mere moveable rights, subject to be exercised at the option of the owner of the soil, and, if the buildings are to be taken away, they become moveables, after being detached from the soil; until then, however, they are immovables, as being a part of the estate composed of the soil and of the improvements, and may be mortgaged by the owner of such estate. Duranton, Vol. 19, No. 258.

Under the French laws it is well settled, that a right of *emphytéoses* (unknown to our laws,) a *bail emphytéotique*, is susceptible of being mortgaged. Duranton, Vol. 19, No. 268. Troplong, Hypoth, Vol. 2. No. 405. But this is peculiar to the French legislation, and is governed by special laws upon the subject. In contradistinction, however, with the right of mort-

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gaging property held under a *bail emphytéotique*, it has been decided by the court of Cassation, that: "*Il ne suffit pas qu'un bail soit à longues années pourqu'il puisse être considéré comme emphytéotique. Ainsi celui qui sur un terrain pris à ferme pour 27 ans, a élevé des constructions en vertu d'une clause du contrat, n'a sur les constructions qu'un droit de jouissance mobilière par sa nature, et par conséquent non susceptible d'hypothèque.*" This opinion had been entertained by the royal court of Paris, whose judgment was reviewed by the supreme tribunal. Dalloz, *Jurisprudence du XIX Siècle*, vol. 19, p. 61, *Verbo Louage*, sect. IV. And it seems from the case itself, which we have examined, that it has the greatest analogy with the one under consideration. See also Troplong, *Contrat de Louage*, on art. 1709 of the French Code, from which our art. 2644 was borrowed. No. 19, *et seq* Thus, it is well settled in France, under a similar system, that if a lessee has erected buildings on the soil leased, by virtue of a clause in the contract, his right on such buildings is limited to a mere moveable right of enjoyment, and is not susceptible of mortgage; and we think that under our laws, a similar doctrine can safely be adopted.

But, by the very terms of the contract in this case, no doubt can be entertained, as to the intention of the parties, that the lessor should be considered as the owner of the improvements; he is to have, at the expiration of the lease, the possession and enjoyment of the lot and buildings; they are to become *his property*, without his being bound to pay any compensation; this last clause was inserted in the act undoubtedly to avoid the exercise of the lessee's right, under art. 500 of our Code, by which the latter would be entitled to claim a compensation; and we do not hesitate to decide, that the lessee, having nothing but a mere moveable right of possession and enjoyment of the premises, resulting from the contract itself, and even from the law, he could not validly mortgage them. They were not his absolute property, and he had no right to alienate them.

From this view of the question it results, that the appellants, Turner and Flower, are not mortgage creditors of the insolvent; that they are mere ordinary creditors; and that they have no right, as such, to dispute the application or imputation of the

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proceeds of the sale of the leased premises to the satisfaction of the rent due to the lessor, under the stipulations of the contract, from which it is clear that such rent as should not be punctually paid, should be discharged out of the proceeds of the sale of a portion of the buildings. It is equally clear that, under art. 2676 of our Code, the right of pledge, or privilege, allowed by law in favor of the lessor, also extends to the sums collected or to be collected from under tenants, and even to the effects of the latter, so far as they are, or may be indebted to the principal-lessee; and that, therefore, the syndics have no right to dispute it. As to the lessee, or his syndics, there was no necessity to record the lease.

In relation to the liquidation of the appellees' claim for rent and taxes against the estate of the insolvent, we think that as to the amount of rent due, the liquidation is correct. It was admitted on the trial that the rent from 1839 to 1841 was settled by notes, amounting together to \$6,150; that the syndics are yet (on the day of the trial, which took place in July, 1844,) in possession of the premises, and that there is an agreement for the collection of the rents; and the record shows sufficiently that, the syndics having refused to deliver possession of the property to the executors, they, said syndics, kept the control and possession of it, so as to continue to collect the whole of the rents from the under tenants. This makes them responsible for the whole rent to the appellees, and three years thereof (\$9000 to the 9th of May, 1844,) was properly allowed below.

With regard to the reimbursement of the claim for taxes, we think it has been fairly and justly liquidated. The contract contains a clause in which it is stipulated that: "*Les taxes d'état et de paroisse sur le dit lot de terre susdécrit seront payées par M. Girod ou ayans cause; les dites taxes sur les batisses qui seront construites sur le dite lot terre seront payées par le dit sieur Miller ou ayans cause.*" Girod, and, since his death, his executors have always paid the whole of the taxes, while Miller was bound to pay the state and parish taxes due on the buildings; but they were assessed together, and it became necessary below to resort to parol evidence to ascertain the proportion which Miller was to pay for the buildings; and this brings us to the consider-

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ation of a bill of exceptions found in the record, from which it appears that, on the executors' introducing witnesses to estimate, according to their knowledge of the facts and of the situation of the premises, the proportion of taxes due by Miller, the evidence was objected to by the appellants' counsel and admitted by the court. This bill, however, has not been insisted on by the counsel in their written arguments, and seems to be abandoned; but had it been urged that the testimony was illegal, our impression is that it was properly admitted. The assessment of the taxes had nothing to do with the contract between the lessor and the lessee, and the want of it cannot be any bar to the recovery of the proportion due by Miller under the contract, on the lessor's showing the extent of said proportion, and the payment of the taxes assessed on the whole property. This was done below, and although, under art. 2672 of the Civil Code, the landlord is bound to pay all taxes, we think, that, according to the peculiar clause contained in the contract, the appellees had a right to claim the reimbursement of the amount established by the evidence, and that such amount has been properly allowed.

In conclusion, we are of opinion that, the claim of the executors, under the contract, not being in conflict with the superior rights of any other creditor of the insolvent, the compensation contended for by the appellees was correctly maintained below; that the amendment to be made to the tableau of distribution filed by the syndics, is fully supported by law and by the evidence; and that the judgment appealed from is in all respects correct.

Judgment affirmed.

CLAUDE ANTOINE CHOPPIN and others v. JEAN PIERRE MICHEL.

An act of sale of lands, passed in 1774 before a Spanish commandant in Louisiana, in the presence of two witnesses, which recites that the vendor did not sign it because he could not write, and that the title was delivered to the vendee who took immediate possession, and which had remained among the notarial records of the parish, is admissible in evidence to prove a title to the property. *Per Curiam*: The act would have been sufficient evidence of title under the Spanish law, which permitted parcel sales of immovables; it has all the requisites of an authentic act; and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it, the ordinary mark of a party to an authentic act not being required at that period.

An extract certified by the clerk from the minutes of the court, showing that a judgment had been rendered in a suit, though the minutes were signed by the judge, is not the best evidence of the judgment, as the law requires a judgment to be given and signed in every case; and it is to be presumed that one exists until the contrary is shown. The extract from the minutes would be admissible to prove a judgment rendered in 1814, on proof that no judgment could be found in the record, and that no other than that entered on the minutes appeared to have ever existed, or that it had been lost.

Testimony of witnesses taken in a suit between other parties, offered to prove possession by persons long since dead, is inadmissible, where the affidavit made for the purpose of laying a foundation for its admission does not state that the witnesses are dead, nor what efforts have been made to procure other evidence of the fact.

Copies of judgments of the Supreme Court, certified by the clerk, are sufficiently proved. The signatures of the Spanish governors, and other known officers of the former provincial governments of Louisiana, prove themselves. Where any question is raised as to the authenticity of such signatures, or the authority of the officer, the burden of proving the fraud or want of authority, devolves on the party alleging such fraud or want of authority.

A defendant in a petitory action may defend himself by setting up title in a third person.

By a royal order of the 22d October, 1798, the power to grant lands was taken from the Governor of the province of Louisiana, and restored to the Intendant.

APPEAL from the District Court of West Baton Rouge, *Deblieux, J.*

GARLAND, J. The plaintiffs allege they are the owners, and that they, and those under whom they claim, have always been in possession of a tract of land of fifteen *arpents* front on Fausse Rivière, by a depth of forty *arpents*. That notwithstanding their title, which has been confirmed by the United States, and their actual possession, the defendant pretends to be the owner of a part of said land. They say the land now claimed is a

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part of a tract of forty *arpents* front on the Mississippi river, by the same depth on the lower channel of Fausse Rivière, which was granted on the 9th February, 1767, by Desmazillieres, then Commandant of Pointe Coupée, to Pierre Perreault, and is derived from him by a regular chain of titles. They ask a judgment for the land, and for \$1,000 damages.

The defendant denies generally the allegations in the petition, and specially denies that the plaintiffs are either the owners or possessors of the land claimed, or that they have any title to the same. He further says, that he is the *bona fide* owner and possessor of a plantation, situated on the river Mississippi, with a front of about twenty-seven *arpents*, with such depth as will make a superficial quantity of 800 *arpents*, the same having been granted, located and surveyed under the Spanish government in Louisiana, bounded on the upper side and rear by vacant land, and on the lower line by Estevan Watts, and on the point by the river. This land he says was granted to Joseph Mollere by Governor Gayoso, on the 14th February, 1799; and was, on the 4th June, 1800, regularly located by Lareau Trudeauau, Surveyor of the Province, &c. That he holds, owns and occupies this land by regular conveyances from Mollere; therefore he sets up his title, and pleads the prescription of ten, twenty and thirty years. The answer concludes by a prayer, that, in case of eviction, he may have a judgment for \$10,000 for improvements, he being a possessor in good faith.

Choppin, one of the plaintiffs, was a defendant in the case of *Devall v. Choppin et al.*, 15 La. 566, and, with the other plaintiffs, now claims the fifteen *arpents* front on Fausse Rivière, by a depth of forty *arpents*, running towards the Mississippi, under the same title which the defendants in that suit set up to protect themselves from the claim of Devall, in which they succeeded. For the particulars of this title, see pages 571, 572, 573 of the report mentioned. The rights of Dupré and Demonville, the other plaintiffs, are derived from Choppin and the heirs of François Lebeau, whose title formed a part of the suit alluded to; and, in fact, had Devall succeeded in his suit, his titles, derived from Conway, would have covered a considerable portion of the land to which the plaintiffs assert a title. In this case, it

is further proved by Charles Morgan, that on the 4th of August, 1806, he, as a United States surveyor, and in pursuance of an order of the Surveyor General, surveyed the tract of land called Pointe du Manoir, for Pierre Perreault or Perreau, and gave it forty *arpents* front on Fausse Rivière by the same on the Mississippi, making 1,468 acres, equal to about 1,600 *arpents*. Baudin lived for some time on the land. L'Hermite, also a surveyor, says that, in February, 1821, he surveyed the land for Alexander Baudin, and followed a plat that appeared to have been made by Morgan. The lines then extended to that of Labauve, and included the fifteen *arpents* front, claimed by the plaintiffs, it being exactly forty *arpents* from the Mississippi to the limit of Labauve. Baudin then occupied the land, as he had previously. In 1820 he presented his claim to the Land Office in New Orleans for confirmation. He represented it as being situated at a place called Pointe du Manoir, at the eastern mouth of Fausse Rivière, containing forty *arpents* front on the Mississippi, and forty *arpents* in depth, bounded on one side by the channel of Fausse Rivière, and on the other by the Mississippi. The claim was supported by the titles now again presented; it was recommended for confirmation, and was actually confirmed, as reported, by an act of Congress passed the 28th February, 1823; but from the plat of survey obtained from the Surveyor General's office, in May, 1844, it appears that the claim has been located for only 875 98-100 acres; and it is evidently not located according to the confirmation, from which the Surveyor General says, "there is no conflict known to this office."

The defendant's title is based upon a *requête*, signed in New Feliciana, the 26th November, 1798, by Joseph Mollere, who prays the Governor to accord to him eight hundred superficial *arpents* of cypress land in the district of Pointe Coupée, "a dos y media leguas del fuerte o antiguo reducto rio abaxo y lindando por el sur contieras apeadas a favor de Dn. Estevan Watts." On the 14th February, 1799, Governor Gayoso gave the usual order on this application, directing the Surveyor General to put the party into possession of eight hundred *arpents* of vacant land as prayed for, without causing prejudice to any other proprietor, &c. On the 4th June, 1800, Lareau Trudeau located

the claim as fronting on the Mississippi, bounded on the lower side by Don Estevan Watts, and above and in the rear by vacant land. The claim was presented by Mollere, or his heirs, for confirmation, and by the commissioners rejected, as there was no proof of possession on the 1st October, 1800. On the 2d July, 1818, the parish judge of East Baton Rouge offered the land at public auction, as a part of the property belonging to the heirs of Mollere, who had died in the year 1811, or previously. At this sale, the land was adjudged to Pierre Gautier for \$800, payable in one, two and three years. The land is sold with an express stipulation of no warranty on the part of the vendors, and at the risk and peril of the purchaser, to whom the title was exhibited. On the 29th March, 1820, Gautier sold, by public act, before the same parish judge, to the defendant, the same tract of land, describing it as the one purchased of the estate of Mollere on the 2d July, 1818, as would more fully appear by the act, then of record in said office. In this act, Gautier only warrants against himself, his heirs, or persons claiming under him. The defendant took possession of the land soon after this sale, and has held it ever since. He has paid taxes on it as Gautier did, and also cultivated it. In 1820, he presented it to the Land Office in New Orleans, for confirmation; it was reported on favorably, and confirmed by Congress at the same time that the claim of Baudin was. The confirmation was in the name of the heirs of Mollere, for the use of Michel. The claim has been located by the Surveyor General of the United States, and the full quantity of eight hundred *arpents* allowed it.

One witness testifies that, in the year 1804, he was on the land for several days with Mollere, who had one or more cabins on it, for the use of himself and some slaves who were there getting timber, and that it appeared as if he, or some other persons, had been there at other times. It is also shown that one Robin Delogny was also on the land, or near it, cutting timber; but whether he had permission from some of the parties, or was a trespasser, is not proved. No title to any land in that quarter is exhibited, or pretended to exist in the name of Delogny, further than may be inferred from his name being mentioned in

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one of the acts between Baudin and Guinault, as being a contiguous proprietor.

The court below gave a judgment for the defendant, on his plea of prescription, and the plaintiffs have appealed.

Our attention is first called to several bills of exception.

I. The plaintiffs offered in evidence a copy of an act of sale from Perreault to Herbert or Hebert, to the introduction of which the defendant objected, on the ground that it does not appear that the act was signed, and that the certificate of the judge is no proof that it was. This is the same objection taken by the counsel of Devall in his case against Choppin et al.] in 15 La. 573-4. It was then held to be admissible, and we see no reason to change our opinion. The only difference now is, that the document is offered as evidence against Michel, instead of Devall. In both cases it was relied on, as being part of the title under which the plaintiffs claim.*

II. The plaintiffs offered in evidence, in order to show a title in Baudin, an execution issued against Catherine Herbert, &c., in a suit brought by her against Mathurin, in which it is said that there was a judgment against her for costs; also a sheriff's deed to Baudin; and, to prove that there was a judgment of non-suit, they offered an extract from the minutes of the court, which were signed by the judge thereof, wherein the title and

* The nature of the document offered in evidence is explained in the following extract from the opinion of the court in *Devall v. Choppin et al.*

"Plaintiff objected to the production of a copy of the act of sale from Perrault to Herbert, on the grounds that the original had not been signed by the vendor, that it is not an authentic act, and that, therefore, the original must be produced and the signatures proven. The act was passed in 1774, before the Commandant of Pointe Coupée, in the presence of two witnesses, and states that the vendor did not sign it, because he did not know how to write; the title is mentioned to have been delivered to the vendee, who, it appears, took immediate possession of the land. We think this act would have been sufficient evidence of title under the Spanish law, which, as this court has repeatedly recognized, permitted parol sales of immovables; it has all the requisites of an authentic act; as such it remained deposited among the notarial records of Pointe Coupée, and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it; at that remote period, the ordinary mark of a party to an authentic act was not required. In our opinion, the District Judge did not err in permitting the copy to be read in evidence." 15 La. 573.

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number of the suit is given, the court and the parish named, also the year and day of the month; and it says—"Plaintiff non-suited, and to pay costs of suit to be taxed."* This was objected to, as an extract from the minutes of the court was not the best evidence, since the law requires a judgment in each case to be given and signed, which it is to be presumed was done. The judge admitted the extract from the minutes to be read. In this, we think, he erred. The judgment taken from the record is certainly the best evidence, and we are to presume that one exists, until the contrary is shown. This proceeding took place in the year 1814, when the courts were somewhat more indifferent as to forms than at present; and this court has, on several occasions, leaned in favor of their proceedings, when the ends of justice were to be promoted.

But, we think, before secondary evidence should be admitted, it should be proved that the best cannot be obtained. In this case, if it were proved that no judgment could be found in the record, that no other than that entered on the minutes seemed ever to have existed, or that the papers were lost, we should be disposed to say that the extract from the minutes was admissible; but until some ground is stated, or foundation laid, we think it unadvisable to depart from the settled rule. In one instance, we held a sale under execution good, upon proof of the judgment being lost.

III. The plaintiffs in order to show an early possession in Herbert and others, under whom they claim, offered in evidence the depositions of Madame Porche and J. B. Tournoir, taken in the

* Subjoined is the extract offered in evidence:

"Catherine Herbert, widow of Pierre F. Bidou, No. 227. v. George Mathurin.	}	Fourth District Court, Parish of Pointe Coupée, Louisiana, Tuesday, 7th April, 1814.
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Plaintiff non-suited, and to pay costs of suit to be taxed. (The minutes are signed)
 April 19th, 1814. H. M. BRACKENRIDGE, Judge 4th District.

State of Louisiana, Parish of Pointe Coupée. I, the undersigned, Clerk of the Fourth Judicial District Court, do hereby certify that the foregoing judgment of non-suit has been by me truly extracted from the minutes of the court. Given under my hand and seal, this 22d day of November, A. D. 1837.

{ L. S. }

A. BELZOUS, Clerk."

suit of *Devall vs. Choppin et al.* They were objected to, on the ground that the defendant was no party to that suit. But the court received them, on the ground that there was nothing suspicious about them, and that the testimony related to an ancient settlement, and possession, by persons long since dead. For the purpose of laying a foundation to admit these depositions, the affidavit of one of the counsel was offered, who deposed that he had sought in vain, with one of the plaintiffs and a justice of the peace, among the oldest inhabitants of Pointe Coupée, for witnesses relative to the possession of Joseph Herbert, and his insanity, and other facts, and could not find any. But the affidavit no where states, that Madame Porche or Tournoir are dead, nor what particular efforts were made to get testimony. We think the judge erred. He should have at least required the plaintiffs to make out a strong case, to authorise them to use such evidence against a party not present, nor represented when it was taken. We will not undertake to say, under what circumstances these depositions may be admissible, nor for what purpose. It is at present sufficient to say, that they should not have been admitted under the circumstances they were.

IV. The plaintiffs offered in evidence, "a certified copy of judgment rendered in the Supreme Court, in the suit of *Alexander Baudin v. Dubourg and Baron, attorneys in fact, &c.* This was objected to, so far as it relates to all proceedings previous to those in that court, on the ground that they were not certified to be copies of the original by the proper officer." From the manner in which this objection is stated, we do not understand that any thing more than the judgment of this court was offered as evidence. If that be true, then the judge did not err, as the clerk of this court is entirely competent to certify copies of its judgments.

V. The defendants offered in evidence, in order to show a want of title in Madame Bidou, a certified copy of a paper purporting to be the petition of one Juan Glaize, addressed to the Governor General, in 1776, in which he says, that he had purchased the land claimed by the plaintiffs of Joseph Herbert, and praying that he be put in possession of it, and an order of Governor Galvez thereon, dated in 1777. The original is cer-

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tified to be in the office of the judge of the parish of Pointe Coupée. To this the plaintiffs objected, on the ground that it does not appear to be an original, nor an authentic act, nor a copy certified by a proper officer. The judge certifies that the copy is from an original document, and the contrary cannot therefore be presumed. The order at the foot of the petition or letter, is directed to the Commandant of Pointe Coupée, directing him to put the petitioner in possession of the land at the *Punta del Manoir*, and purports to have been signed by Governor Galvez. This court has frequently held, that the signatures of the Spanish governors, and other known and authorised officers of the provincial government prove themselves. If any doubt existed as to their authenticity and genuineness, or as to the authority of the officer, the burden of proving the fraud, or want of authority, devolves on the party making the objection.

The document is on file in the office of the parish judge as a muniment of title belonging to Juan Glaize, or some person claiming under him. It certainly does not belong to the defendant; and all he can do is to produce a copy of it, unless it can be shown that the court has authority to compel the parish judge as its custodian, to produce it in court. The defendant has a clear right to set up an outstanding title in another person, to protect himself; and, if the document is calculated to prove such title, it is admissible, and the court erred in rejecting it.

Upon the merits, we are of opinion that justice requires this case to be remanded for a new trial. It appears to us, as the case is now presented, that the title under which the plaintiffs' claim has not been located according to the terms of the confirmation by Congress, or the grant to Perreault by the French authorities, nor in conformity to the survey made by Morgan in 1806. Besides this, Morgan testifies that nearly one-third of the land surveyed by him as included in the title to Perreault, has been washed away by the river. It is, therefore, important to ascertain where the ancient boundaries were, and how much of the land still remains within the ancient limits. It is also important to ascertain something more in relation to the defendant's title. It is a fact well authenticated by public documents, and by the public history of the

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country, that, on the 22d of October, 1798, a royal order was issued taking from the Governor of the Province of Louisiana the power to grant lands, and that that authority was restored to the Intendant. This order was formally communicated to Governor Gayoso, on the 13th of February, 1799, and his order directing the Surveyor General to put Mollere in possession of the land asked for in his petition dated in the month of November previous, is dated on the 14th of February, 1799. Mollere asks for a tract of land, two and a half leagues from the old fort or redoubt, descending the river, adjoining the land surveyed to Estevan Watts. None of the witnesses tell us any thing about the location of the old fort, or the distance of the land claimed from it.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and this case remanded for a new trial, with directions to the court below, in the admission and rejection of testimony, to be governed by the principles herein stated, and otherwise to proceed according to law; the defendant paying the costs of the appeal.

S. L. Johnson and L. Janin, for the appellants.

G. S. Lacey and Labauve, for the defendant.

JOHN MILLIKEN v. JAMES ANDREWS and others.

Parol evidence is inadmissible to prove that a slave sold by defendant to plaintiff, was represented as possessing certain qualifications not mentioned in the act of sale.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

MARTIN, J. The plaintiff is appellant from a judgment rejecting his claim to the rescission of the sale of a slave, purchased from the defendant Andrews, on the ground of a redhibitory malady, and the absence of certain qualities which said defendant declared he possessed.

The first judge was of opinion that the incurability of the disease under which the slave is stated to labor, was not established; that its existence was not positively traced up to the

time of the sale ; and finally, that the representations of the qualifications, the absence of which was complained of, did not appear in the bill of sale ; and that the evidence by which they were attempted to be proven, was vague and insufficient.

We concur in the opinion of the first judge, that the plaintiff cannot recover on the score of the absence of the qualifications said to have been announced, because the act of sale is silent as to them, and no parol evidence could be received of them.

The slave was purchased on the 21st of April, 1840 ; and a physician who saw him in the latter part of May, or beginning of June following, attests, that "the cause of the disease under which he labored, must have existed for months previous to his seeing him ; that the disease was a dropsy of the chest ; and that there was a *possibility* of a cure being effected, but it was not *probable* he could recover so as to become a healthy slave." Other witnesses depose that the slave was not put to any hard work, was properly clothed and fed, and that due medical aid was given to him.

The trial took place in June, 1843, and the judgment was signed in June, 1844, upwards of three years after the sale. Until then, had the slave died, evidence of that fact might have been received. It is shown that he was tendered to the defendant, who refused to take him ; but we have no evidence whether he recovered from, or succumbed to the disease. True it is a witness deposes he does not know when and where the slave died ; but this cannot be received as evidence of the slave's death, for the witness does not inform us of the reasons he has to believe that he is dead.

As the plaintiff, who had the possession of the slave, has not shown that, at the time of the judgment, he was dead, or continued to labor under the disease, it may be contended that the first judge did not err in giving judgment for the defendant. We have nevertheless thought that the case ought to be remanded for a new trial, in order to afford the parties the opportunity of producing more evidence, if any there be.

It is, therefore, ordered and decreed, that the judgment be annulled, and reversed, and the case remanded for further pro-

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ceedings according to law ; the appellee paying the costs of this appeal.

Short, Winter and Preston, for the appellant.

C. M. Jones, Lockett, Micou, and L. Janin, for the defendants.

THE STATE v. JOSEPH A. BEARD and others.

Indulgence granted by the state treasurer to an auctioneer, by taking his notes for a sum due to the State for taxes on sales made by him, will not discharge the sureties on his official bond. The treasurer has authority to collect whatever is due to the State, but not to receive any thing but money in payment of debts due to it, nor to extend the time of payment, or novate any debt.

APPEAL from the District Court of the First District, *Buchanan, J.*

MARTIN, J. The defendants, an auctioneer and his sureties, are appellants from a judgment by which the State has recovered of them, *in solido*, the amount of certain auction duties received by the principal.

The claim was resisted on the ground that the debt was novated, the treasurer having received from the principal several notes of his on deferred days of payment ; and the sureties sought to avail themselves of this circumstance, to urge their discharge, in consequence of the prolongation of the term.

It appears to us the court did not err. The treasurer has authority, indeed, to collect whatever is due to the State, but we are ignorant of any right in him to receive any thing but money, to extend the time of payment, or to novate the debt.

The judgment, however, ought not to have been given *in solido*. The bond is not so, and the act under which it is evidently given, says nothing of solidarity. B. & C.'s Dig., p. 37, No. 2.

It is, therefore, ordered and decreed, that the judgment so far as it concerns the principal, be affirmed with costs ; and that it be annulled and reversed, so far as it concerns the sureties ; and that ours be against them for the sum of \$258 04½ cents. each, with interest from judicial demand.

Preston, Attorney General, for the State.

Van Dalson and Goold, for the appellants.

Alling v. Egan.

WILLIAM ALLING v. BRIDGET EGAN.

A wife having obtained a judgment of separation of property, levied a *fi. fa.* on the property of the husband, who subsequently applied for the benefit of the bankrupt act of Congress, of 19th August, 1841, and was discharged. The wife's execution not having been satisfied in full: *Held*, that the balance of the debt due by the husband, was extinguished by his discharge.

A creditor who seeks to enforce the payment of a note executed by a married woman, though separated in property from her husband, must prove that the consideration for which it was given, enured to her advantage.

Where a married woman, sued on her note, secured by mortgage, given for the repayment of money counted and delivered to her in the presence of the notary's clerk, adduces evidence which shows that the transaction was a disguised advance to her husband, she will be bound, if it be shown that she subsequently converted the fund to her own use, under false pretences, to the prejudice of the creditors of her husband.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*

BULLARD J. The defendant, who is separated of property from her husband, and is a public merchant, being sued upon her promissory note, the payment of which is secured by mortgage upon her separate property, answered that she did execute and deliver the note sued on, together with another for \$1,500, but she avers that they are void and not obligatory on her. That they were not executed for her benefit, nor has she ever received or enjoyed any part of the consideration, but that they were executed and given by her, at the request of the plaintiff and of her husband, with the intent to secure to said plaintiff certain sums of money, then due to him and owing by Egan, her husband, and that the note and mortgage were drawn in that form as a disguise to bind the defendant for a debt of her husband. She further claims, in reconvention, the sum of \$1,600, which she alleges the plaintiff has in his hands belonging to her, it being the excess, over and above what was due to him on a former judgment, of the price of certain property of hers sold at sheriff's sale, and bought in by the plaintiff. She, therefore, prays that the note sued on may be declared null, and that she may have judgment in reconvention.

The note sued on bears date November, 1843, and it appears that after the defendant had recovered a judgment of separation

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of property, and levied an execution on her husband's property, he went into bankruptcy. We must, therefore, regard the balance of the debt due by the husband to his wife as extinguished by the discharge in bankruptcy, and that, consequently, she had no longer a right to issue an execution; that any property acquired by him afterwards was free from any claim on her part; and that, in truth, the community had ceased to exist.

Having premised these facts, and with this principle in view, it is important to enquire what became of the fund borrowed of the plaintiff, and whether, in truth, it turned to the advantage of the defendant, or that of her husband; for it is now too well settled to require a reference to authorities, that the burden is upon the creditor in all cases like this, to show that the contract sought to be enforced against a married woman turned to her advantage.

The circumstances which attended the loan of money secured by mortgage, are singular. The money was actually counted to Mrs. Egan by Alling, in presence of the notary's clerk. About the same time, the books of the plaintiff show cash sales to Egan, the husband, for about the same amount, except a small lot of clothing previously sold to his wife, and which was sent back by her, and then returned to the store as a part of the stock of the husband. Simultaneously with this loan and purchase of goods, Egan was installed as a merchant in the store at the corner of Levée and Poydras streets, his name put in several conspicuous places, and books opened in his name. The stock upon which he was to carry on his business, released as he had recently been from his previous debts by going into bankruptcy, was undoubtedly, in a great measure, procured from the plaintiff by the very money which had been nominally loaned on the credit of Mrs. Egan, the defendant.

If, under these circumstances, Egan had continued to go on with business on his own account, and in his own name, to the knowledge of the plaintiff, without any interference on the part of his wife, with whom he was no longer in community, we should consider her as having merely lent her name and credit for the benefit of her husband, and consequently that she would not be bound, unless it could be clearly shown that her husband

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was merely her agent, and that the business was in fact her own, although carried on in his name. But she did not abstain from interfering, and it is her subsequent acts which led to the breaking up of the husband and the transfer of the whole concern to the wife, which gave rise to the question raised in this case. On the 14th of May, 1844, the record shows that she caused a *pluries fi. fa.* to issue on the judgment recovered against her husband before his bankruptcy, and seized the whole stock of goods, and, on the 5th of June, as appears by the sheriff's return, the whole was sold, *in globo*, and the defendant became the purchaser of the *contents* of the clothing store for \$4,000.

It is hardly necessary to say, although it does not appear to be universally known, that married women are as much bound to be honest as their husbands, and that it is equally incumbent on them to come into court with clean hands. We are not prepared to admit the doctrine literally as contended for by the defendant's counsel, that this suit embraces no issue other than the validity of the contract made by the wife, and that the issue must be decided upon the evidence touching the contract itself, and not by subsequent and collateral events. On the contrary, we think the contract is apparently valid. The money was paid into her own hands, after her separation from her husband; and, with a view to avoid the contract, she adduces evidence to show that, in point of fact, it was a disguised advance to her husband. Shall she be permitted to stop here, and exclude all evidence as to the winding up of the transaction, tending to show who profited by the advance thus obtained, and the credit thus given to her husband? Clearly not. About twenty-eight hundred dollars were advanced by the plaintiff, and four thousand came into the hands of the defendant under pretence of a previous judgment which had become absolutely extinct by the bankruptcy of the husband. If it should be said that only a part of the stock of goods purchased by her at the sheriff's sale were the same sold by the plaintiff to Egan, it may be replied, that, although the plaintiff may not have had the vendor's privilege, the goods were the pledge of the creditors of Egan, and that the plaintiff is the only creditor shown by the record. It is further shown in the record that Mrs. Egan was herself the lessee of the

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store from the 31st of October, 1843, for one year, she alone having signed the lease; and it is not disputed that she had been previously a public merchant.

Thus the evidence adduced in this case appears to place the defendant in a dilemma; either she obtained the credit for her own benefit as a merchant, and employed her husband as her agent, or she was surety for her husband, but afterwards converted the fund to her own use, under false pretences, to the prejudice of his creditors; and in either case her defence must fail her.

The principle here urged by the defendant's counsel is substantially the same as was adopted by our learned brother of the Commercial Court, in sustaining the defence of the defendant, and giving judgment in her favor. He says it is not shown that the stock of goods was the same purchased of the plaintiff, and, if it was, it is not the kind of benefit which the law requires to create an obligation on the wife. The benefit must be direct and immediate from the contract. In this view of the case we do not concur; on the contrary, we are of opinion that her whole defence must be taken together; and that, if it turn out that, in consequence of the contract, she has put money in her pocket, equal at least to the sum advanced on her credit, she fails in her defence, and is bound by the original contract.

The court below did not pronounce upon the reconventional demand of the defendant, who had mortgaged other property which was bought in by the plaintiff at sheriff's sale, who, according to the sheriff's return, retained in his hands the whole amount of the purchase, about \$1,500, over and above the amount stated in the order of seizure, to meet the payment of the previous mortgages on said property. The transaction is quite distinct from the one now before the court; and if she has any recourse against the plaintiff for money unjustly retained, it is hereby reserved to her in a separate action.

The judgment of the Commercial Court is, therefore, reversed, and it is adjudged and decreed that the plaintiff recover of the defendant, Bridget Egan, thirteen hundred and ninety-two dollars and thirty seven cents, with interest at eight per cent from the 20th of November, 1843, till paid, and costs of both courts,

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and that the mortgaged property be seized and sold to pay the same.

Hoffman, for the appellant.

Benjamin and *Micou*, for the defendant.

LOUIS PILIÉ and others, Testamentary Executors of Lucien G. Hiligsberg v. THE CITIZENS BANK OF LOUISIANA.

An executor cannot grant a mortgage on any part of his testator's estate; nor can a Probate Court authorize him to do so, though for the purpose of releasing other property of the succession, already mortgaged, with the view to sell it.

APPEAL from the District Court of the First District, *Buchanan*, J.

MARTIN, J. The bank is appellant from the decision of the District Court on an application for a *mandamus*, commanding it to suffer that a mortgage, given to it by the plaintiffs' testator on certain property, be transferred to other property of the estate of equal or greater value, the estate having an interest to dispose of the mortgaged premises.

It appears to us that the court erred. No law authorizes an executor to grant a mortgage on any part of the testator's estate, and it would be dangerous for the courts to grant such a power. If it is to be exercised, the legislature ought to give it. Our jurisprudence requires that successions should be settled with celerity, and that administrators should not be allowed to retain the management of them indefinitely. Most of them would find it to their interest to keep for a long the management confided to them, and few would be the cases in which it would not be easy to contend that obtaining money by mortgage, and endeavoring to pay the debts out of the revenues of the estate would be more advantageous to the heirs and creditors, than to dispose of any part of it by a sale. Courts of Probate, from whom authority to mortgage would be asked, would seldom have the time, inclination and means to act with safety, in granting or refusing the authority; and, in case it was improvi-

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dently given, there would seldom be a party ready to solicit the interposition of this court.

It is, therefore, ordered and decreed, that the judgment be avoided and reversed, and that ours be for the defendants, with costs in both courts.

Bodin, Bernard and Roselius, for the plaintiffs.

Denis and Pitot, for the appellants.

BRIDGET DUNN and others v. SARAH KENNEY and others.

Where plaintiffs, having failed in obtaining their evidence in time for a trial urged by the opposite party, were unable to make out their case, and the court ordered a dismissal as in case of non-suit, they will not be regarded as having abandoned the suit within the meaning of art. 3485 of the Civil Code, which declares that where a plaintiff abandons, or discontinues his case, prescription shall be considered as not having been interrupted thereby.

The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties afterwards lived together as man and wife, is sufficient legal evidence of a marriage; and the testimony of a witness who swore that he was a justice of the peace in another State, and celebrated the marriage, is sufficient proof of the fact that the witness was a justice.

District Courts have jurisdiction of an action to annul the legacies in a will, instituted by persons claiming to be heirs of the deceased, against the legatees in possession.

APPEAL from the District Court of the First District, *Buchanan, J.*

E. C. Mix and Elwyn, for the plaintiffs.

Preston, for the appellants.

BULLARD, J. The plaintiffs represent that they are the heirs at law of Barney Coffey, who died in the year 1836, leaving a testament, which has been admitted to probate, containing legacies to Sarah French, *alias* Coffey, of one-third part of his estate, and to his two children by said Sarah French, to wit, John and Ann, each of one-third. That said legacies are void, because the deceased Barney Coffey was not married to Sarah French at the time the will was executed, but that she had a lawful husband living at the time, to the knowledge of said Barney, to wit, one Peter Haney, from whom she eloped many years since with the said Barney, and lived in open concubinage. They

pray that the legacies may be declared null and void on the ground of incapacity, alleging further that the mother of Barney Coffey was living at the time of his decease.

Judgment was rendered for the plaintiffs, and the defendants appealed. In this court they further pleaded the prescription of five years, as a bar to the action to set aside the dispositions of the will, under art. 3507 of the Civil Code.

The judgment below was for the plaintiffs on the merits, and an attentive examination of the evidence in the record has satisfied us that it is not erroneous. The pre-existing marriage of Sarah French with Haney, and her elopement with Coffey, who knew of her previous marriage, are satisfactorily shown. The plea of prescription presents the only difficulty in the case.

This suit was instituted more than five years after the probate of the will. The prescription established by art. 3507 of the Code will consequently apply, unless by the effect of a previous action instituted by the plaintiffs, in which a judgment of non-suit was rendered, the prescription is to be considered as interrupted. The general rule is that prescription is interrupted by a suit instituted (art. 3484) ; but the next article provides that, "if the plaintiff in such case, after having made his demand, *abandons* or *discontinues* it, the interruption shall be considered as having never happened." Art. 3485.

The record of the former suit shows the following entry: "This cause came on to-day for trial before a jury, when the plaintiffs having offered no proof in support of their claim, it is adjudged and decreed that judgment of non-suit be entered against plaintiffs, and that they pay costs of suit."

If the record had shown that a jury was empannelled, we might have inferred that the non-suit was voluntary, because the defendant, in cases tried by a jury, has a right to a verdict, unless the plaintiff chose to suffer a non-suit. But that does not appear in this case.

In the case of *Edrington v. Tête* (2 Rob. 330), upon which the appellant relies, judgment final was rendered in favor of the defendants, and the plaintiff appealed, and in this court insisted that the judgment should have been one of non-suit. It appeared that the plaintiff had moved for a continuance, but on

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its being opposed he left the court, without either proving his case, or taking a bill of exceptions. The only question on the appeal was, whether the court erred in giving final judgment for the defendants, after an *ex parte* trial under such circumstances; and we held, that the plaintiff had no good ground to complain, and that we must presume the continuance was properly refused.

The case of *Chretien v. Theard* occurred under the old Code, which did not contain the exception insisted on in this case. 2 Mart. N. S. 582.

In *Pratt v. Peel's Curator* (3 La. 282), there was a voluntary dismissal of the case, after the Supreme Court had intimated that the party could not obtain redress in the form of proceeding first adopted, by intervention. This was held not to be such a voluntary abandonment as to prevent the suit thus brought from interrupting prescription.

We conclude from all the circumstances in this case, that the plaintiffs, having failed in obtaining their evidence in time for a trial which was urged by the opposite party, were not able to make out their case, and that the court ordered it to be dismissed as in case of a non-suit; and that, under such circumstances, they ought not to be regarded as having voluntarily abandoned their case, in the sense of article 3485 of the Code.

There is a bill of exceptions in the record from which it appears, that the testimony of one Newsom, who swore that he was a justice of the peace in the State of Ohio, and celebrated the marriage of Peter Haney with Sarah French, was inadmissible, because the witness was incompetent to prove his capacity as a justice of the peace, and there was no legal evidence of the fact. The objection was overruled, and, we think, correctly. The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties lived together afterwards as man and wife, is, in our opinion, sufficient legal evidence of a marriage.

There is a further bill of exceptions to the admission in evidence of certain depositions. The part which appeared hearsay, was stricken out by the court, and the bill has not been insisted upon in argument.

Dixon v. The Firemen's Insurance Company of New Orleans.

The question as to the jurisdiction of the District Court was decided in the case of *O'Donogan v. Knox*, 11 La. 384.*

Judgment affirmed.

SUSAN J. DIXON v. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

The appellants, stockholders in the Firemen's Insurance Company of New Orleans, having paid only the first instalment of five per cent on each share, the Directors declared the stock forfeited. Plaintiff having obtained judgment against the company, sued out a *fi. fa.* under which interrogatories were propounded to the appellants; and, on a rule taken on them to show cause why they should not be compelled to satisfy the execution to the extent of their unpaid subscriptions: *Held*, that under the act of 10th March, 1838, incorporating the company, the directors had no right to declare the stock forfeited after the payment of only five per cent, and that the appellants were bound to satisfy plaintiff's judgment to the extent of their unpaid subscriptions.

APPEAL from the District Court of the First District, *Buchanan, J.*

Rozier and Roselius, for the plaintiff.

Durant, R. N., and A. N. Ogden, for the appellants.

BULLARD, J. This case, like the two lately decided of *Mandion v. The Firemen's Insurance Company*, *ante*, pp. 177, 178, arose out of the failure of the company, against which the plaintiffs had recovered a judgment and issued a writ of *fieri facias*. The appellants, Bathurst and Cammack, original stockholders of the company, were proceeded against as garnishees, and answered that they had subscribed for stock, but that having failed to pay more than the first five per cent required by the charter, their stock had become forfeited by resolutions of the Board of Directors in conformity to the charter and bye-laws.

**Preston*, for a re-hearing, urged that, if it be true, as the court have concluded, that the plaintiffs were non-suited in their first suit, before swearing the jury, it could only have been done in consequence of their failure to appear, which would be a voluntary abandonment of the suit, or, by their choice, in case of their appearance. A plaintiff cannot be non-suited against her will, before her case is submitted to a jury. *Bore v. Bush*, 6 Mart. N. S. 1. *Kernion v. Guenon*, 7 Ib. 171. The oral testimony of the witness was insufficient to prove his authority as a magistrate.

Re-hearing refused.

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The case, therefore, presents the question, whether a stockholder could, according to the charter, by refusing to pay the contributions required by it, cease to be a stockholder, so far as third persons dealing with the company are concerned. This question having been decided against the garnishees, they appealed.

The third section of the charter declares, " that the subscribers of the said company shall pay, at the time of subscribing, five per cent upon each share, and five per cent every sixty days thereafter, until fifty per cent of the capital stock shall be paid in; provided, that if the fifty per cent should be by losses reduced, *then* the President and Directors shall call in such other instalments, so as that the said company shall *always have in possession* at least forty per cent of its capital; thirty days previous notice being given of such call in two papers, in English and French; and any stockholder failing to pay any *such instalment so called for*, shall forfeit to said corporation all previous payments which may have been made, and cease to be a stockholder."

It appears to us obvious, that the authority conferred on the Directors by this section, to declare a forfeiture of stock for the non-payment of instalments, was given as a means of coercion of the payment of said instalments as they were required to call for, in order to keep up the fund in possession to at least forty per cent. The first fifty per cent is required to be paid by the charter, and the Directors have no discretion. If not paid, the delinquent stockholder may be sued and compelled to pay. It is only after the payment of such amount of fifty per cent, when it is evidently the interest of the stockholders to pay further instalments, that they may be called on to pay instalments so as to keep up the capital to at least forty per cent, and, in the event of such payments not being made, after public notice, the stockholder may be compelled to forfeit what he has already paid. The public dealing with the company, and paying premiums of insurance, have a right to believe that there is on hand, to meet occasional losses, at least forty per cent of the capital contemplated by the charter; and we cannot give such a construction to the charter as would make that the means of avoiding the liability of a stockholder even to the amount to be paid in the

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first instance, which was intended as the means of compelling the stockholders to make further payments on their subscription in the event of losses. The public is ignorant of the transaction of the Board with the stockholders, and a proceeding unauthorised by the charter cannot release a stockholder from his responsibility, so far as the creditors of the company are concerned.*

Judgment affirmed.

BENJAMIN MANDION V. THE FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS—LOCKETT, Garnishee.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
BULLARD, J. This case, as well as two others lately disposed of between the same plaintiff and other garnishees, turns upon the question whether Lockett has been exonerated from his obligations as a stockholder. In addition to other grounds urged by him, he contends, that the modification of the charter by the act of the 20th March 1839, without his assent, and after he had ceased to take any part in the concerns of the company, produces that effect; and that he is no longer bound. The record does not distinctly inform us, in what manner and under what circumstances that amendment of the charter was accepted. Justice requires, in our opinion, that the case should be remanded for further proceedings, and particularly to enquire into those facts.

It is, therefore, adjudged and decreed, that the judgment be reversed, and the case remanded for further proceedings, and a new trial according to law; and that the appellee pay the costs of the appeal.

Rozier, for the appellant.

Lockett, appellee, *pro se.* *Benjamin* and *Micou* on the same side.

* An application, by the counsel of the appellants, for a re-hearing in this case, on the ground of changes in the charter effected by the act of 20th March, 1839, to which it was contended that the appellants had never assented, was refused, as the point had not been made according to the rule of court.

Riley v. The Ocean Insurance Company.

JOHN RILEY v. THE OCEAN INSURANCE COMPANY.

There can be no abandonment as for a total loss, in a case in which the damage is under fifty per cent of the value of the thing insured.

Where the policy provides that the vessel insured is warranted free from average, unless general, under fifteen per cent, the limitation forms a part of the contract, and the insurers will not be liable unless the loss is proved to have exceeded that amount.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. This action is on a policy of insurance on "the body, engine, tackle, apparel and other furniture" of the steamer *Ellen Douglass*, for four months, at and from the 8th of April, 1840. The perils assured against are of the river and fire, and all that shall come to the hurt, detriment, or damage of the said vessel. The policy is for \$4,000, and, by agreement, the steamer, engine, &c. are valued at \$20,000 without further account in case of loss. The steamer, &c., is warranted free from average "under fifteen per cent, unless general." An insurance for \$6,000 had previously been taken in the Protection Office, at Natchez; and another for \$8,000 in another office in that city, both of which are endorsed on the policy.

The petition is in the usual form, claiming the amount of the policy and certain expenses incurred in saving a portion of the wreck, and giving credit for a sum for which the boat and engine sold. The answer denies generally all the allegations, and specially that the plaintiff had any interest at the time of the loss. It is also averred, that the defendants have good cause for believing, and do believe the said steamboat was set on fire with a view to defraud the underwriters.

The evidence is that the *Ellen Douglass* was an old boat, having been running for five or six seasons. One witness, who was a clerk for some time on her, says that she "was six and a half years old when she was burnt."

After the last insurance was effected, the boat continued to run on the Mississippi and Ohio rivers, until about the early part of June, when she was carried to Louisville for the purpose of having some repairs made on her. On the 12th of that month,

the plaintiff wrote to a co-proprietor of the vessel, that he had consulted with ship carpenters about the repairs, and found that it would cost more to repair her to make her good for two years, than they could afford to expend on her; wherefore he had thought it most advantageous, not being able to sell her at private sale, to put her up at auction, one-half payable in cash and the other at six months credit, when she was sold for \$1,300. He says he could buy her then for the same money, and perhaps would. The real fact is, there was no sale of the boat, as the person to whom she was adjudged swears, he had been requested by the plaintiff to bid on her, to prevent a sacrifice. He never paid any thing, did not take possession, nor was any sale ever made in writing, or otherwise. About the 4th of July, the plaintiff carried the steamer to New Albany, a short distance from Louisville, where he proposed to have some repairs made to her hull and engine. Some of the witnesses say, that he spoke of converting her into a boat for towing vessels to and from New Orleans to the passes at the mouth of the river; others understood that his purpose was to strengthen her, so as to be able to tow ships and other vessels on the river above the city. At New Albany the engine was taken out, with the exception of the shafts and fly-wheel, and, at the time of the fire, a part of it was in a foundery, and a part on the wharf. All the furniture was taken out of the main cabin, and packed away in the aft or ladies cabin, the doors of which were locked and the windows nailed down. A careful and experienced watchman was put on board to take care of the vessel, and on the evening of the 7th of July, about five or six o'clock in the afternoon, the vessel being safely moored, the plaintiff left her, and, with two of his slaves, went to Louisville. The watchman swears, that no one was sleeping in the ladies cabin, or had slept there for several nights previously; that there was no fire on board the boat; and that when he went to bed, about nine o'clock, no light was left burning. About midnight a fire broke out in a state room in the ladies cabin, and, before it could be arrested by the firemen and others, the whole of the cabin where it commenced was consumed, with all the furniture, and the main cabin was destroyed as far forward as within six or eight feet of the *social-hall*, or

forward cabin. There were only a few chairs and a bed in the main cabin, which were saved.

The witnesses generally concur as to the time and manner of the fire's appearing, but there is some discrepancy as to the extent of the damage, and much more as to the value of what was destroyed. One or two of the witnesses, assuming that it was the intention to convert the steamer into a tow boat, say the damage was small, as it would have been necessary to take off the cabin at any rate, and therefore it was no great loss. They think an expense of seven or eight hundred dollars would be sufficient to fit the vessel for towing ships, &c., to the mouth of the river. One ship carpenter who was present at the fire, and saw the boat before and afterwards, estimates the damage at \$1,200; another says \$2,000; a third witness says \$2,500; and the clerk of the boat, who knew all about the furniture, swears it would have taken \$4,205, according to his estimate, to replace every thing. The engine was not injured at all; nor the hull, except by a small hole cut into the side, for the purpose of scuttling her. That was repaired for \$3. The day after the fire the plaintiff returned to New Albany, made a regular protest, and abandonment of the wreck to the underwriters; and, assuming the character of their agent, about two months after, sold the hull, engine, &c., at public auction, when it was adjudicated to one Isaac Wright for \$600. Whether he ever paid any thing for the wreck, or took possession of it, we are not informed; but shortly after we find the plaintiff in possession, and bringing a large cargo to New Orleans, having the hull towed down, and taking out the engine and machinery to put them in another boat. The record does not inform us when notice was given to the defendant of the loss or abandonment, though it is admitted that an abandonment was sent to the office, but not accepted. No directions were given to plaintiff after the fire, nor any steps taken to prevent his selling the boat, although more than two months elapsed between the fire and the sale.

The jury found a verdict for the plaintiff, assessing his damages at \$2,000, and from the judgment based on it the defendants have appealed.

The verdict of the jury negatives the allegation made by the

defendants, that the steamer was set on fire to defraud the underwriters; and we do not find in the record sufficient evidence to induce us to say that the verdict is incorrect on that point.

Assuming the valuation fixed by the parties in the policy as the actual value of the vessel, engine, furniture, &c., and the plaintiff has furnished us with no other, an examination of the testimony satisfies us, that it is not a case in which an abandonment can be made as for a total loss. The damage is not pretended to exceed fifty per cent of the value; and if such a pretension were advanced, it would be repelled by the evidence. The highest estimate of the loss is \$4,205, which is but little more than one-fifth of the value expressed in the policy.

The question now arises, whether the plaintiff can recover for an average or partial loss. The counsel for the defendant contends that he cannot, as the loss is not fifteen per cent of the value, and the insurers are warranted free from average, unless general, under that amount.

Policies generally contain a provision, in the form of a memorandum or otherwise, that the underwriters are not to be liable for any particular average, whether on vessel or freight, or any article of merchandise other than those enumerated in the memorandum, unless it amount to a certain rate per cent. 2 Phillips on Ins. 477. Particular average and partial loss mean the same thing in effect, and when there is an exception, or limitation as to the extent of the loss for which the underwriters shall be liable, it forms a part of the contract, and protects them unless the damage is proved to exceed a certain per centage. If we admit, for the argument, that on a policy in which a value is fixed on the object insured, the question of value can be opened when a partial loss takes place, (a question we do not decide,) we shall then see in what position it places the plaintiff. As we have before said, he has not shown us, otherwise than by the estimate in the policy, what the actual value of the Ellen Douglass was at the time of the loss. We must then take \$20,000 as her value; and unless the damages amount to fifteen per cent, on that sum, the plaintiff cannot recover.

The clerk of the plaintiff swears, that it would take \$4,205 according to his estimate, to replace every thing. Suppose this

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to be true, it must be recollected that the estimate of which the clerk speaks, would make every thing new; and, according to another well settled rule, there must be a deduction of one-third of the cost, on the principle of new for old. Deduct one-third from the estimate, and the actual damage will be about \$2,800.

But three other witnesses testify as to the damage, and the highest estimate is \$2,500. When we find such a wide discrepancy in the estimates and opinions of witnesses, it is perhaps about fair to adopt a medium course; and as the weight of the testimony fixes the damage under \$3,000, or fifteen per cent of the value, we are of opinion that the defendants are not liable, being protected by the warranty in the memorandum.

It is ordered and decreed that the judgment be annulled and reversed, and that there be judgment in favor of the defendants, with costs in both courts.

F. H., and W. S. Upton, for the plaintiff.

F. B., and C. M. Conrad, for the appellants.

HENRY HORN and others, Assignees of the Girard Bank v. JOHN BAYARD and others.

An act of the legislature of Pennsylvania, of 5th March, 1842, provides, that any assignment of property, made by a bank in pursuance of that act, must be approved by the Court of Common Pleas of the county in which the bank is situated, and be recorded in the office of the Recorder of Deeds for the same county; and an act of 14th April, 1834, authorizes the prothonotaries of the courts of Common Pleas to sign the judgments of those tribunals. Plaintiffs offered in evidence a copy certified by the Recorder of Deeds to be a true copy from the records of his office, of an assignment made by a bank under the act of 1842, and of a certificate annexed to it signed by the prothonotary of the Court of Common Pleas, and sealed with its seal, reciting that the court had approved of the assignment. Appended were certificates from the presiding judge of the Court of Common Pleas attesting the signature and official capacity of the Recorder of Deeds, and from the prothonotary of the court attesting the signature and official capacity of the presiding judge. Defendants excepted to the evidence, alleging in their bill that the assignment could only be proved by producing the original, or, on showing that it could not be had, a copy compared therewith; that the act of Congress respecting the authentication of non-judicial records, was inapplicable to the case; and, if applicable, had not been complied with. The bill did not state in what the act had not been complied with. *Held*, that the act of Congress applies to such a case; that so general an ob-

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jection as that the law has not been complied with, is insufficient in a bill of exceptions; and that such generality cannot be corrected by specifications after appeal. Defendants having attached certain bank bonds and notes belonging to plaintiffs, and having recovered judgment in the court below, caused them to be sold under a *fi. fa.* The judgment was reversed on a devolutive appeal. Plaintiffs, in an action for damages for the illegal attachment, having proved that the bonds and notes had fallen in value pending the seizure, and that they were sold for much less than they might have been sold for had no attachment been issued: *Held*, that the defendants should pay the actual damages caused by their attachment.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Halsey and Wray*, for the plaintiffs.

T. Slidell, for the appellants.

GARLAND, J. The plaintiffs claim the sum of \$8,982 58, with interest, as damages sustained by the corporation they now represent, in consequence of the defendants, in the month of February, 1842, suing out an attachment against the bank, and having certain bonds of the Planters' Bank of Mississippi, and notes of the Commercial and Rail Road Bank of Vicksburg, seized and sold, when, on appeal to this court, the judgment rendered in favor of the defendants was reversed, and a judgment given against them. They allege that the value of the notes and bonds aforesaid was determined by the fluctuations in the market, and that, at the time of the attachment, and for some months subsequently they were worth the sum of about \$18,500, yet the defendants had them sold, in August, 1842, at a sale by the sheriff, at a great sacrifice, and, that they only brought the sum of \$9,140. The difference between these sums they claim as damages.

The defendants deny all the allegations in the petition, and especially do they deny the corporate capacity of the bank, and also the alleged capacity of the plaintiffs, as assignees.

On the trial, the institution of the suit by the defendants against the bank was proved by the record; the execution of the attachment was shown; and a reversal of the judgment which the defendants had obtained. See 4 Rob. 262. The appeal taken was a devolutive one. The sale by the sheriff was proved by the execution and return on it. Twelve of the bonds of \$1,000, with *coupons* for \$35, were sold for \$353 each; and ten others, each for said sum with a *coupon*, were sold for \$345

each. Ten thousand dollars of the Vicksburg bank notes were sold at six and a half cents on the dollar, making \$650; and ten thousand dollars more were sold at eight cents on the dollar, making \$800. It was further proved that these bonds and notes had been sent to the Commercial Bank of New Orleans for sale, at a certain price, which was above their value at the time; but there is ample proof that about the time of the attachment, and for a considerable time subsequently, the bonds were worth from fifty to fifty-five cents on the dollar, and that the notes of the Commercial Bank of Vicksburg ranged from fourteen and a half to twenty cents on the dollar, at the same time; the prices varying according to the supply and demand.

The act of the legislature of the State of Pennsylvania chartering the bank was produced, and also a deed of assignment from the corporation to the plaintiffs, made in obedience to the resolutions of the board of directors, which includes the claim in controversy.

The court gave judgment for \$5,145 damages, and the defendants have appealed.

Our attention has been called to two bills of exception taken by the defendants. The first states that the plaintiffs, for the purpose of proving the assignment to them, offered in evidence a document with certain certificates thereon, one of which purported to be a certificate of the prothonotary of the Court of Common Pleas of the county of Philadelphia, that the deed had been approved according to law. The defendants' counsel objected that the copy so certified, was inadmissible to show the approval of the alleged assignment by said court. That such approval should have been shown by a certified copy of the record of said court, authenticated by the certificate of the judge and clerk, with the seal of the court; but the court overruled the objection, and admitted the deed. We are of opinion that the court did not err in admitting the certificate. The laws of Pennsylvania are in evidence, and from them we see that it is necessary that such assignments shall be approved by the court; and we also see that the prothonotaries are authorized to sign and certify the judgments of the courts of Common Pleas. Purdon's Dig. p. 833. From an inspection of the terms

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and phraseology of the so called certificate, we think it is the judgment of approval by the court, written on the deed and signed by the prothonotary as authorized by law, and necessary to authorize its being recorded.

The other bill states that the plaintiffs offered in evidence for the purpose of proving the execution of the assignment to them, a document with certain certificates thereon, made part of the bill of exceptions ;* whereupon the counsel for the defendants

*The following certificates were appended to the copy of the assignment, which was dated the 16th of March, 1842 :

"City and County of Philadelphia, sc :

Be it remembered, that on the seventeenth day of March, in the year one thousand eight hundred and forty-two, the Court of Common Pleas for the county of Philadelphia, approved of the within deed of assignment.

{ Seal of the Court
of Common Pleas }

Witness my hand and seal of the said court, this seventeenth day of March, in the year of our Lord one thousand eight hundred and forty-two.

S. HART,

Prothonotary of the Court of Common Pleas of the county of Philadelphia.

I, Richard L. Lloyd, Recorder of Deeds, &c., for the city and county of Philadelphia, do certify the above and foregoing to be a true copy of a certain instrument of writing, remaining of record in my office, in Deed-book G. S., No. 37, page 430, &c.

{ Seal. }

Witness my hand and seal of office, this 27th day of December, A. D. 1843.

R. L. LLOYD,

Recorder.

Pennsylvania, }
Philadelphia County, sc. }

I, Edmond King, President of the First Judicial District of Pennsylvania, and Presiding Judge of the Court of Common Pleas, Orphans' Court, Court of General Quarter Sessions of the Peace, for the said county, do certify that Richard L. Lloyd, Esq., by whom the foregoing record, certificate and attestation were made and given, and who, in his own hand-writing, has thereunto subscribed his name, and caused his seal of office to be thereunto affixed, was at the time of so doing and now is Recorder of Deeds for the city and county of Philadelphia, duly commissioned and qualified, to all whose acts as such full faith and credit are, and ought to be given, as well in courts of judicature as thereout. Witness my hand, at Philadelphia, this twenty-seventh day of December, A. D. one thousand eight hundred and forty-three.

EDMOND KING,

Pres. Judge of the First Jud. District.

Pennsylvania, }
Philadelphia County, &c. }

I, Richard Palmer jr., Esq., Prothonotary of the Court of Common Pleas of said county, do certify that the Hon. Edmond King, Esq., by whom the foregoing certi-

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objected, that the execution of said assignment could only be proved by the production of said instrument itself, or a compared copy thereof proved to be correct, the inability to produce the original being also explained; that the act of Congress respecting the authentication of records not judicial was not applicable, and that if so, it had not been complied with. We are of opinion that the act of Congress is applicable, and the bill of exceptions is silent as to the particulars in which the law has not been complied with. In his brief the counsel for the defendants informs us, that his objection is, that the judge of the court of Common Pleas does not in his certificate say, that the certificate of the recorder of deeds is "*in due form*." He contends that the very words used in the act of Congress must be used, and that no others will answer the purpose. To this objection, the counsel for the plaintiff reply, that no such objection was made in the court below, nor is it stated in the bill of exceptions. We have frequently said that so general an objection, as that a law had not been complied with, in a bill of exceptions, was not sufficient. It should appear in the bill, in terms sufficiently definite, what the objection is, so that the other party may see what he has to meet. A different practice would lead to frequent difficulties, and is calculated to entrap parties. We cannot permit a general objection to be made in the lower court, and then specifications to be made here.

Upon the merits of the case, we are satisfied that the law and evidence sustain the judgment. The defendants illegally took out an attachment against the bank, seized its property, and had it sold at a price much below that at which it could have been sold for, if the attachment had not been issued. This

cate and attestation were made and given, and who in his own proper hand writing has thereunto subscribed his name, was, at the time of so doing, and now is, President of the First Judicial District of Pennsylvania, and Presiding Judge of the court of Common Pleas, Orphans' Court, and court of General Quarter Sessions of the Peace for said county, duly commissioned and qualified, to all whose acts as such full faith and credit are, and ought to be given, as well in courts of judicature as thereout.

In testimony whereof, I have hereunto set my hand, and affixed the seal
 { Seal. } of the said court, at Philadelphia, this 27th day of December, A. D. 1843.

R. PALMER JR., Prothonotary.

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court subsequently decided that they had no claim against the bank ; and although we see no reason for vindictive damages, yet they must pay the actual damage caused by the attachment. The bank wished to sell the assets it possessed, to pay its debts ; and it was prevented from doing so by the defendants, pending whose seizure the assets attached were much reduced in value.

Judgment affirmed

MANUEL CRUZAT v. JOHN DAVIS.

The office of Coroner is held for a term of four years. Act 1 March, 1827, s. 1.

APPEAL from the District Court of the First District, *Buchanan, J.*

Buisson, Benjamin and *Roselius*, for the appellant.

T. Slidell, and *Preston*, Attorney General, for the defendant.

MARTIN, J. The plaintiff is appellant from a judgment rejecting his claim to the office of coroner, of which the defendant is in possession. He produced a commission from the Governor, appointing him, with the advice and consent of the Senate, bearing date April 2d, 1835, in which the tenure of the office is not stated. The defendant has a like commission, bearing date the 16th of February, 1844.

The first law relating to the coroner is an act of the Legislative Council of the Territory of the year 1805, under which the tenure of the office is at the will and pleasure of the Governor for the time being.

In lieu of that officer, in the year 1807, a parish judge, appointed for four years, was to act as coroner. Statutes of 1807, page 14, section 10.

In 1808 (page 8), the Governor was authorized to appoint a coroner.

During the territorial government, offices, the tenures of which were not fixed by law, were held during the will and pleasure of the Governor. Under the State government, in 1814, (B. and C.'s digest, page 170, § No. 3) the Governor was directed to ap-

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point a coroner for each parish. By the act of 1827 (B. and C.'s Digest, p. 781, No. 21), the coroner is directed, *after the expiration of his term of service*, to continue to perform the duties of his office until his successor, or himself, *in case of re-appointment*, shall be inducted into office.

Offices for life were never known to the laws of the Territory, nor of the State; and the tenure during good behaviour, in our jurisprudence, appertains only to offices to which it is given by the constitution or law. The Legislature was directed by the 8th section of the 6th article of the Constitution to determine the time of duration of the several public officers, when such time had not been fixed by that instrument.

We have the authority of the Legislature, in the year 1827, that the office of coroner is holden during a *term*. This repels the presumption that it is held during life or good behaviour, for the act speaks of the re-appointment of the incumbent, after his term of service has expired, which precludes the idea of a tenure for life, or during good behaviour, because, if the office expired by death, there could be no possibility of a re-appointment, and if it did by breach of official good behaviour, the re-appointment would be impossible, and extremely improbable in case of a removal by an address of two-thirds of the members of both houses.

Assuming then that the Legislature considers the injunction of the Constitution in the article 6th above cited, as virtually complied with, we conclude that the office of coroner is now holden under a *term*, and that four years is the longest period which we can recognise.

The plaintiff's commission expired in 1839, and there is no evidence of his re-appointment. The defendant's commission bears date on a day on which it does not appear that the office was filled.

Judgment affirmed.

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FRANÇOIS SAULET v. MARGUERITE TREPAGNIER and others.

No recourse can be had on the sureties in an appeal bond, until it be clearly shown by the creditor, that the proceeds of the sale of all the estate and effects of the principal, have proved insufficient to discharge his demand. So, where a husband appeals from a judgment against him for a community debt, and dies, leaving children and a widow who accepts the community, the sureties on the appeal bond will be liable only in case the judgment is not satisfied by the widow and heirs so far as they are respectively bound for it, and cannot be satisfied by the sale of all their property, real and personal, liable for its payment.

APPEAL from the District Court of the First District, *Buchanan, J.*

Buisson and Roselius, for the plaintiff.

Josephs, for the appellants.

MORPHY, J. This action is brought against the widow and heirs of François Trepagnier, who had become surety on an appeal bond for Pierre Trepagnier, against whom the plaintiff recovered a judgment for \$15,000, with interest from the 3d of May, 1836, which judgment was affirmed by this court in June, 1842. 2 Robinson, p. 358. It is alleged that, since the signing of the bond both the principal and the surety have died, the latter leaving a large estate to the defendants, his widow and children. That, on the 6th of October, 1842, an *alias fi. fa.* was issued against the heirs of the late Pierre Trepagnier, by virtue of which a levy was made, and the net amount of \$11,475 12 was paid over to the plaintiff, leaving a balance still due to him of \$8,527 88, with legal interest from the 7th of January, 1843, and that said writ has been returned, "no property found after demand made of both parties." Judgment is prayed for against Marguerite Foucher, widow of the late François Trepagnier, for one half of the balance due, as having held the property of the deceased in community with him and not having renounced, and against her co-defendants for one-tenth each, as heirs of the deceased.

The defendants admit the signature of François Trepagnier to the appeal bond, but allege that, in consequence of the gross neglect and indulgence of the plaintiff, the whole of the property, real and personal, of Pierre Trepagnier, the principal debtor,

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has never been seized to satisfy his debt, and still remains subject and liable to be discussed. That the note on which judgment was obtained formed the last instalment due on the price of a plantation and slaves which the plaintiff had sold to Pierre Trepagnier; that it bore a mortgage upon the said plantation and slaves, against which the plaintiff must first pursue his recourse; that the original defendant, Pierre Trepagnier, died in October, 1838, leaving about \$88,363 in property, and owing about \$54,000, including plaintiff's claim, and that plaintiff did not legally cite all the heirs and parties in interest, and carry on the suit against them according to law. That he was guilty of neglect in not recording the judgment appealed from, and also in not issuing his writ of execution thereon against all the heirs of Pierre Trepagnier, who were all bound, each for his virile portion, and against his widow, Marie Celeste Delhomme, who was bound for one-half of said judgment, the same having been obtained on a community debt. That thirteen slaves belonging to the succession of Pierre Trepagnier were seized by the sheriff of St. Charles under plaintiff's execution, and released by order of plaintiff or his attorney; that said slaves were liable to be seized, and can, with the other property of Pierre Trepagnier's succession, upon all of which plaintiff's original mortgage still exists, amply satisfy his judgment; that the condition of the appeal bond is, that the judgment shall first be satisfied by the sale of all said P. Trepagnier's estate; and, consequently, that these respondents, the widow and heirs of the surety, are not bound until the whole of said property has been discussed, and taken out of the hands of the heirs and representatives of the principal debtor, or the possessors thereof. There was a judgment below against the defendants, from which they have appealed.

It is in evidence, that Pierre Trepagnier died in October, 1838, pending the appeal; that he left a widow in community, and eight children; that an inventory of his estate was made, which shows that his property amounted to \$87,981 50, and his debts to \$54,000, including \$18,000 that were then due to François Saulet; that Marie Céleste Delhomme, his widow, accepted the community, and kept, at the price of the appraisement,

community property consisting of slaves and movables to the amount of \$8,734 50 ; and that the balance of the succession was sold at auction. That the debt upon which the judgment appealed from was rendered was a community debt, resulting from the purchase of a plantation and slaves, sold by the plaintiff to Pierre Trepagnier, in 1829. It further appears that although Marie Céleste Delhomme had accepted the community, she was not made a party to the appeal pending in this court when her husband died ; that the plaintiff issued an execution only against the children of the deceased ; and that no steps whatever have since been taken against his widow, or the property in her hands.

Under these facts, we think with the appellants' counsel, that the present action is premature, and that the contingency has not yet arrived on which the widow and heirs of the surety in the appeal bond can be made liable. According to article 579 of the Code of Practice, the condition of their ancestor's obligation was, that the appellant should satisfy the judgment to be rendered against him, or that the same should be satisfied by the sale of his estate, real or personal. In *Chalaron v. McFarlane*, this court held, under that article, that sureties on an appeal bond have a right of resisting a recourse on them, until it is clearly shown by the creditor, that the sale of all the estate and effects of the principal has proved insufficient to discharge his demand. 9 La. 227.

On the death of Pierre Trepagnier, his obligation to satisfy the judgment in favor of the plaintiff devolved not only upon his heirs, but also upon his widow, who, by her acceptance of the community, became bound to pay one-half of its debts. With regard to the surety on the appeal bond, the said widow and heirs became the principal debtors in lieu of Pierre Trepagnier ; and it is only in case they do not satisfy the judgment so far as they are respectively bound for it, or in case the same cannot be satisfied by the sale of all their property, real or personal, that the defendants, as the widow and heirs of the surety, can be made liable in their place. We are by no means prepared to say that in general a creditor may not, if he choose, look to the heirs of his debtor for the whole amount of his claim. In such a case the heirs could not pretend that, because the wife had ac-

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cepted the community, and thereby made herself liable for one half of its debts, they are responsible only for the other half. They would be bound, we believe, to pay the whole debt, and might then have recourse upon the widow, to make her contribute for one half of it. The obligation which the widow incurs by her acceptance of the community is an additional security for the creditors; but they have a right to look to the heirs and direct representatives of the husband for the whole debt, because it is with him they treated, and it is him whom they trusted. *Ejus solius fidem secuti sunt*, says Toullier, vol. 13, No. 233. 2 Pothier, *Traité de la Communauté*, No. 719. But although the creditors have this option, the widow, who has accepted the conjugal partnership or community, becomes absolutely and personally bound to them for one-half of its debts. If the heirs of the husband do not, or cannot, satisfy their claims in full, they can come upon her for the proportion which she owes as the partner of her husband. Civil Code, arts. 2378, 2379. *Lauderdale v. Gardner*, 8 Mart. 716. *Flood et al. v. Shamburgh*, 3 Mart. N. S. 629. 13 Toullier, No. 236. 2 Pothier, *de la Communauté*, No. 728. If then the widow of Pierre Trepagnier stands indebted to the plaintiff, it is as a principal debtor for a portion of the debt for which the defendant's ancestor was surety. On principles of equity it is held, that the surety of one of several principal debtors, bound *in solido*, has a right to require the discussion not only of the property of the debtor he has become surety for, but also of that of the other co-debtors, before he can be called upon to pay the debt. 1 Pothier on Obligations, No. 413, *in fine*. If such be the right of an ordinary surety, who is not entitled to the benefit of discussion unless he claim it, the defendants should surely enjoy the same privilege, when, under the bond, they cannot be made liable if the principal debtors pay the debt, or if it can be satisfied by the sale of their property, real or personal. But independently of the personal liability of the widow of Pierre Trepagnier under her acceptance of the community, it is shown in this case that she is in possession of a number of slaves which belonged to the succession of her husband. It would seem that the plaintiff is at least bound to discuss these slaves, which are a part of the very property which,

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under the terms of the appeal bond, must be exhausted before any recourse can be had against the defendants. Were it otherwise the latter would lose not only the benefit of requiring the discussion of the property of one of the principal co-debtors, but also that of exhausting the property which belonged to Pierre Trepagnier, and which their ancestor no doubt had in view when he consented to become his surety for such a large amount. It may be said that no execution could issue against Pierre Trepagnier's widow, because she was not made a party to the appeal, and no judgment was rendered against her. The plaintiff, who knew that in consequence of her acceptance of the community, a portion of the property might go into her hands, which he was bound to discuss before he could look to the surety on the appeal bond, could, and perhaps should have made her a party to the appeal. His failure to do so cannot change the condition of the bond. Its only effect must be to impose upon him the necessity of resorting to such proceedings as will enable him to comply with such condition as regards the personal liability of the principal debtor's widow, and the property of his succession which is shown to be in her hands.

It is, therefore, ordered that the judgment of the District Court be reversed, and that ours be for the defendants as in case of non-suit, with costs in both courts.

LOUIS BARTHELEMY MACARTY v. JAMES ANTHONY GASQUET.
THE SAME v. WILLIAM AMEDEE GASQUET.

Parol evidence is inadmissible to alter, modify, or contradict a written act of transfer of immovables or slaves, or to prove any agreement or stipulation beyond its contents, where there is no allegation of fraud, error or violence. C. C. 2256. But such evidence is admissible to prove that the adjudication price of real estate sold at auction, was paid to a creditor holding a mortgage on the property, and the manner of such payment.

The title of property sold at auction vests in the purchaser from the moment of the adjudication. C. C. 2586.

APPEALS from the District Court of the First District, *Buchanan, J.*

Macarty v. Gasquet.

L. Janin, for the appellant.

Roselius and *L. Peirce*, contra.

SIMON, J. The object of these two actions is to recover of the defendants, who were sued separately, the possession of two distinct lots of ground, with the buildings thereon erected, to which the plaintiff sets up title under a sale executed to him, by authentic act, by the assignee of the insolvent estate of Daniel T. Walden, the former owner thereof. James A. Gasquet, the defendant in one of the suits, having disclaimed any title in himself to the lot sued for, but having alleged that the property was in William A. Gasquet, as whose agent he holds the same, the latter intervened to defend his title to it, and the two suits having been consolidated, they were tried as only one suit against William A. Gasquet, as sole defendant.

The title set up by the plaintiff to the two lots and buildings, is based on the allegations that he acquired them from the assignee of D. T. Walden, a bankrupt, by an act passed before a notary public, on the 1st February, 1843, in which he, plaintiff, was represented by Auguste Delassus, who had sufficient powers to buy for him the property upon which he, plaintiff, had special mortgages, if the same should be exposed at judicial sales. That the same power of attorney, however, conferred no authority upon said Delassus to sell again property which he might thus acquire for account of said plaintiff; that notwithstanding said want of power, Auguste Delassus did sell, in the name of the petitioner, the said property to the defendant, by an act passed before Wm. Christy, a notary public, on the 10th of the same month; that said defendant was aware of the want of power of Delassus, and that the sale is not binding on the plaintiff.

The answer denies that the plaintiff is owner of the property sued for, and avers that the same was, with other property, purchased by him, defendant, at a sale of the bankrupt Walden's estate, made by order of the United States District Court, through A. S. Robertson, United States marshal, on the 14th of January, 1843. He further alleges that, as there were mortgages on the property to the plaintiff for the amount of the purchase money thereof, and which Delassus, as the plaintiff's agent, was au-

thorised to receive, he did pay to him, through his said agent, the whole amount of said purchase money; that to guaranty and save harmless the respondent, on account of said payment of plaintiff's mortgage, he, plaintiff, through his said agent, made a conveyance to him of said property, though the same belonged to the respondent, who had never parted with the same, and covenanted, in case of difficulty, to return the amount so paid. He further states, that Delassus had full power and authority to receive said amount on account of his principal; that the plaintiff never bought said property, nor paid for it, but that the proceeding had was a mere mode adopted, between the assignee and plaintiff's agent, to receive the amount of his mortgage, and in no manner impairs or invalidates the respondent's title to the same, under his *procès verbal*, which he pleads as a better and prior title; and that the transaction subsequent to the said adjudication, was within the scope of the power of plaintiff's agent, and cannot be annulled in part, so as to give to the plaintiff a property that neither he, nor his agent, ever bought or intended to buy; but that if it be annulled at all, it must be on re-payment to respondent, who would be liable to the United States Court therefor if said acts were unauthorised, by virtue of the adjudication made to him, and be compelled to pay again for the said property.

This controversy was submitted to a jury, who, after having received the charge of the court, (excepted to by the plaintiff's counsel,) found a verdict in favor of the defendant, W. A. Gasquet, and judgment having been rendered thereon by the court *a qua*, after overruling the plaintiff's motion for a new trial, the latter appealed.

The written evidence establishes these facts: 1st. The *procès verbal* of the adjudications, made at public auction by the marshal of the United States, of Daniel T. Walden's property, dated 14th of January, 1843, shows that the lots in controversy were sold and adjudicated to the defendant by the said marshal, for the aggregate amount of \$12,950, payable *one-fifth cash, and the balance on a credit of twelve and eighteen months, for approved endorsed notes*, secured by mortgage. It is admitted in the record, that the property in dispute was mortgaged to the plain-

tiff to secure the amount of a note of \$12,000, due by the insolvent. 2nd. That by a power of attorney, executed by plaintiff to Delassus, by a notarial act passed on the 6th of August, 1840, said Delassus is authorised, among other powers, to receive all sums of money due, or which may become due to his principal, "*par billets, obligations, jugemens, contrats, &c., et à quelqu'autre titre que ce soit, &c., et d'acheter et acquérir en vente publique ou privée toutes propriétés qui seroient hypothéquées au constituant en garantie des sommes à lui dues, et ce, aux prix, termes, clauses, et conditions que les mandataires jugeront convenables.*" But he only gives him the power to sell certain property therein described, and does not authorize him to sell any property by him purchased for his principal in payment of the debts secured by mortgage, the amount of which he is authorised to receive. 3d. That on the first of February, 1843, Walden's assignee, Wm. Christy, sold to the plaintiff, the two lots in dispute, together with other lots, for the sum of \$12,950, payable according to the terms of the adjudication, one-fifth cash, and the balance at twelve and eighteen months credit, &c.; said sale being made to Delassus, as agent of the plaintiff, *in consequence of the property therein described having been adjudicated, at public sale, to L. B. Macarty, as the last and highest bidder thereon.* The aggregate amount of the prices of all the lots sold in said act was \$35,450 00; but it is inserted in the act, that Macarty being the holder and owner of certain promissory notes of the bankrupt, amounting to \$56,000, secured by first and special mortgage on the property conveyed, he, the agent, instead of paying cash and giving notes, has executed his bond in Macarty's name, for his proportion of expenses, &c. 4th. That on the same day, the plaintiff, through his agent, executed his bond to the assignee for the whole amount of the sales, binding himself to account for, and pay such proportion of the expenses and charges incurred in the sale, &c., but stipulating that the amount of his purchases should be subject to his mortgage claims, &c. 5th. That on the 10th of February, 1843, Delassus, as agent of Macarty, sold to the two Gasquets, by separate notarial acts of sale, the two lots in dispute, for the aggregate sum of \$12,950, payable *one-fifth cash, and the balance at twelve and eighteen months credit,*

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by endorsed notes. The act recites that the sales are made with all legal warranties; that the property sold was purchased by the vendor from the assignee of the estate of D. T. Walden, a bankrupt, by act passed before H. B. Cenas, on the first of February inst., and is free from incumbrance; and it stipulates that in case of eviction, the vendor shall not be bound to refund to the purchaser more than the amount for which the property is sold. 6th. That the conditions of the sale were faithfully complied with by the defendant, who paid in cash one-fifth of the purchase money, and gave his notes for the balance with an endorser, which notes were subsequently paid to Delassus. It is proper to remark, that the defendant's notes given for the four-fifths of the purchase money, are dated 14th January, 1843, the day of the adjudication made to him by the marshal, and are the same referred to in the deeds of sale from Delassus to him, executed on the 10th of February ensuing.

That it appears from the written evidence that the property in dispute was duly adjudicated by the United States marshal, to the defendant, at the public sale at auction, of the insolvent estate of D. T. Walden; that the same was not adjudicated to the plaintiff; that the recital in the deed from the assignee to Macarty that the property had been adjudicated to the latter, is incorrect and unfounded; that the defendant had complied with the terms and conditions of the sale as to giving his notes, on the very day of the adjudication; that the sum payable in cash was not by him paid to the assignee, but was paid to Delassus, as mentioned in the acts; that said notes were paid to Delassus, who receipted them as the agent of the plaintiff; that said agent had no power to sell the property by him purchased for his principal, but had a right to receive the money proceeding from the sales made of property mortgaged to his said principal; and that the defendant, in buying the lots from said Delassus, purchased his own property, the title being in him from the day of the adjudication, and there being no written proof of his ever having sold or transferred the same to the plaintiff.

But, in addition to the facts, established by the documentary evidence, the defendant introduced parol evidence, and offered to prove by the testimony of divers witnesses, that the transfer of the adjudication made to the defendant, from said defendant

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to the plaintiff, had been agreed upon for particular purposes, and that the acts purporting to be sales from Delassus, as agent of Macarty, to the Gasquets are not really sales, but only modes devised to procure to Macarty the payment of the mortgage debt due him by Walden. The testimony was objected to on the ground that it tended to vest and divest title to real estate, and also on the ground that it was an explanation of what happened before, at the time, and since the passing of the act. It was admitted by the court, and the plaintiff took a bill of exceptions.

On the question which grows out of this bill of exceptions, it is first proper to premise, that Delassus not being authorised to sell the property of his principal, the sales by him made to the defendant are mere nullities, and are not, as sales, in any manner binding upon Macarty. This, indeed, is the main basis of his action, as he seeks to set aside the sales made in his name by his agent, so as to avail himself of the transfer and conveyance made to him through the same agent, by Walden's assignee, and thereby to be able to recover the property. It cannot be denied that the defendant has acquired nothing from those sales, and that, therefore, said sales being considered as never having been made, the parties must stand upon their original adverse titles, to wit, the defendant on the adjudication made to him by the marshal, and the plaintiff on the transfer or sale made to him by the assignee; and this will give rise to a question of title, which we shall examine hereafter, without reference to any parol evidence.

There is no rule better known in our system of laws and jurisprudence, than that parol evidence cannot be received against or beyond what is contained in the acts, nor on what may have been said before, at the time of making them, or since. Civil Code, art. 2256. Thus, if parol evidence is offered to alter, vary, modify or contradict any part of the stipulations and recitals of a written act, or to prove agreements or stipulations beyond its contents, it is clear that it ought to be rejected, unless the proof offered has for its object to show a want of consent, and that such consent was given through fraud, error or violence, in those cases in which parol testimony is admitted. Here, no er-

ror or fraud is alleged; the transaction on the contrary appears to have been a *bona fide* one, particularly on the part of the defendant; and we think that the judge *a quo* erred, in admitting parol evidence to prove any fact relative to the original adverse titles of the parties, so as to show any change of titles by parol, or to vest or divest them in or from the property, and to give any explanation beyond the contents of the said acts.

But Delassus had a right to receive the proceeds of the sales of the property mortgaged to his principal. This was one of the powers conferred upon him. He did receive from the defendant the amount of the prices of the adjudications made to the latter; and as this fact of payment is independent of any written act, and has no tendency to weaken or destroy the effect of the parties' respective titles, particularly after considering the sales from Delassus to the defendant as never having been made, it seems to us that the parol evidence which was received to prove the payment, and the manner in which it was made to the agent, was properly admitted.

With this view of the question of evidence, we shall disregard all that part of the parol testimony which goes to show a change of title from the defendant to the plaintiff, and from said plaintiff to the defendant, or to contradict, vary or modify the contents of these respective deeds; but we shall enquire into the facts established by such testimony, in relation to the payment of the sum which the written evidence shows has been paid by the defendant to the plaintiff's agent, and into the legal effect of such payment on the rights of the plaintiff. Hence two principal questions will arise:

1st. Who has the best title to the property in dispute, as based upon the written acts produced by the parties respectively, and without any reference to the parol evidence?

2nd. How was the payment made by the defendant to Delassus, and is it binding upon the plaintiff?

I. It cannot be controverted that the title to the property in dispute vested in the defendant from the very moment of the adjudication. This adjudication was the completion of the sale. Gasquet had become the owner of the lots, (Civil Code, art. 2586. 13 La. 287. 19 Ib. 235,) and nothing could divest him of his

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title but a regular sale or transfer made by him to Macarty, or by another with his written consent. Here, the assignee, however, for reasons which we are not bound legally to know or to notice, passed a deed of sale to Macarty of the very same lots which had been adjudicated to Gasquet, and pretended to give him a title based on the incorrect and unfounded fact of said lots having been adjudicated by the marshal to Macarty, as the last and highest bidder thereon. Gasquet was no party to the this act, and consequently is not bound thereby; and nothing proves (except the rejected parol evidence,) that he ever consented to the transfer by the assignee to the plaintiff, or that he had even any legal knowledge of it, except perhaps that, from the reference made to the last deed in the sales of Delassus to him, it may be said that he was enabled to ascertain it on looking at said deed. But those sales do not show on their face, that Gasquet knew of the recital of the adjudication made in the deed from the assignee to Macarty; and we have already said that said sales should be considered as never having been made. The parties, therefore, standing upon these original titles, it seems to us that it appears on their face that the assignee had no right to sell to Macarty; that Gasquet had not been divested of his title; that such title was still in him at the time of the assignee's deed; and that the plaintiff acquired nothing from said assignee. Gasquet was the owner of the lots and buildings, and this shows the incorrectness of the charge which the plaintiff's counsel requested the judge *a quo* to give to the jury, to wit, "that the effect of the assignee's bill of sale to Macarty, was such that up to the time of Delassus' sale to Gasquet, the property was at the risk of Macarty; that, in case of fire, the loss would have fallen upon him; and that a judicial mortgage by a creditor of Macarty, during that interval, would have affected the property." The court below properly refused to give said charge, as it is clear to our minds that Gasquet, never having been legally divested of his title, the property never ceased to be at his risk, and that no judicial mortgage against Macarty could have affected Gasquet's property. We are also of opinion that the charge of the court *a qua*, which was excepted to by the plaintiff's counsel, to wit, "that the adjudication at a public

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sale, passes the title; that the assignee cannot afterwards make the deed to a third person, to the prejudice of the person to whom it was adjudicated, without the consent of the latter, but that such consent will divest his rights, &c.," is perfectly correct and sound.

II. We have already remarked that the defendant, in compliance with the terms and conditions of the sale, gave his notes, dated the very day of the adjudication; that those notes passed into the hands of Delassus, as Macarty's agent; that they were paid to him; and that said agent also received the amount which was to be paid in cash. Thus Delassus, who was empowered to receive the amount coming to Macarty from the sale of the property in extinguishment of the mortgage of his principal, was acting within the scope of his authority; and, without its being necessary to enter into any detailed statement of the facts established, it suffices to say, that the parol evidence shows that the object of the transaction between him and the defendant, was altogether for the purpose of his being put in possession of his principal's money, of preventing its going into the hands of the assignee, and of giving to Gasquet a warranty that it should be reimbursed in case of eviction. He never understood that the amount received should be considered as paid in consideration of the sales made by himself as agent of Macarty, but always had in contemplation that said amount was paid into his hands as proceeding from the adjudication of the property subject to his principal's mortgage. Without the adjudication, the payment would not have been made. Indeed, the parol evidence establishes this fact positively; and if sales were passed, which must be viewed as made without authority, and consequently with no other or further effect than if they had never been executed, they were clearly the consequence of the defendant's wish to make a valid payment, and of the modes devised to procure to Macarty the satisfaction, *pro tanto*, of the mortgage debt due him by the insolvent. But this cannot change the object and nature of the payment; if it was valid without the sales, it must be so with them, since they are without effect. Macarty was not put *duriori casu*; he had paid nothing for the property, since the funds proceeding from its adjudication to Gasquet,

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were in the hands of his agent ; and surely, if without those sales he would have been bound by the payment made to his said agent, we cannot see any valid reason why he should now complain, and attempt not only to take the property from the purchaser and legal owner thereof under the adjudication, but also to permit his unfaithful agent to keep a sum of money which was paid to the latter by virtue and in consequence of the power of attorney proceeding from himself. Again, the payment was valid (Civil Code, art. 2136,) and such an attempt on his part cannot but be reprobated by the sound principles of justice and equity. His situation was never changed, since he never acquired any legal title to the property ; and we are perfectly satisfied that he has no right to dispute the payment made to his agent.

We must, therefore, conclude, that on the face of the very titles produced by the parties, and without reference to any parol testimony, the plaintiff has no right to claim the property in contest, which had been adjudicated by the marshal to the defendant ; that such adjudication was the completion of the sale ; and that the defendant has shown satisfactorily that the payment made to the plaintiff's agent, was in conformity with his power of attorney, and in compliance with the terms and conditions of the sale.

Judgment affirmed.

ABIJAH FISK V. ROBERT MOORES.

Permission to occupy certain premises, without pay, on condition of leaving whenever required by the owner to do so, does not give rise to the relation of landlord and tenant between the parties, nor invest the owner with the lessor's lien or privilege, or right of sequestration. A stipulation for rent is of the essence of the contract of lease. Liens and privileges are *stricti juris*, and exist only where they have been expressly given by law. C. C. 3152.

APPEAL from the District Court of the First District, *Buchanan, J.*

MORPHY, J. The defendant was allowed by the plaintiff the privilege of occupying, without pay, certain premises he owned

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in Julia street, on condition that he should remove therefrom whenever required to do so. Shortly after, the plaintiff having found a tenant for the premises at a yearly rent of \$1250, notified defendant to leave, which the latter neglected or refused to do for more than three months, when the present trial was brought to regain possession. The plaintiff claims \$434 50 for the occupancy of the lot during the three months; \$200 for cash loaned to defendant; \$25 for damages done to the premises in tearing down the fences; and \$6 for money expended in piling lumber in the yard—the whole with a privilege on all the movables found on the premises, which he caused to be sequestered. There was a judgment below in favor of the plaintiff for \$543 50, with a privilege upon the property sequestered. The defendant appealed.

A motion was made below to set aside the sequestration, which, in our opinion, should have prevailed. It issued, we think, improvidently. The mere occupancy of property does not necessarily imply the relation of lessor and lessee, and thus give rise to the landlord's lien or privilege. If it be against the will of the owner, such occupancy may entitle the latter to the estimated rents of the property, as damages for the trespass or illegal detention; but the landlord's lien or privilege grows only out of the contract of lease, which clearly did not exist between these parties. Far from there being any stipulation for a rent, which is of the essence of a lease, the defendant took possession of the property under the express agreement that he should pay nothing, and should restore it as soon as required to do so. The reiterated notices to quit which he received from the plaintiff, excludes all idea even of an implied contract of lease. Civil Code, art. 2641. 12 La. 492. 15 La. 372. Liens and privileges exist only in those cases where they are expressly given by law. They are *stricti juris*, and cannot be extended from one case to another, however just and reasonable it may appear that they should be so extended. Civil Code, art. 3152. 17 La. 160. 18 La. 70.

The several amounts allowed by the judgment appealed from appear to us sufficiently proved. That of \$200, which is alleged to be for money loaned, is shown by the evidence to have been

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an advance on a contract by which the defendant was to furnish lumber to the plaintiff. After a quantity of between 30,000 and 40,000 feet of lumber had been brought into the lot, and represented to plaintiff as sufficient to cover an advance of \$200, which defendant was desirous of obtaining, the former was prevailed upon to give the money. Shortly after defendant sold the greater part of the lumber, leaving in the yard only about 6000 or 8000 feet of it, which were afterwards sequestered as defendant's property, and sold by the sheriff, by consent of parties. Under these circumstances the plaintiff is, we think, entitled to recover back his money.

It is, therefore, ordered, that the judgment of the District Court be reversed, so far as it allows a privilege on the property sequestered, and that it be affirmed in all other respects; the plaintiff and appellee to pay the costs below incurred for the sequestration, and those of this court.

Elmore and W. W. King, for the plaintiff.

Winthrop and Kennedy, for the appellant.

JAMES HEWITT and others v. MONTGOMERY SLOAN.

Plaintiffs having advanced to defendants a certain sum on merchandise consigned to their house in another city, defendant drew a bill on the consignees, in their favor, for the amount advanced. The proceeds of the shipment falling short of the advance, plaintiffs sued for the difference, on an account debiting defendant with the amount of the bill, and crediting him with the nett proceeds of the sale. On an objection that the action should have been on the bill: *Held*, that the suit was properly brought.

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
C. M. Jones, for the plaintiffs.

Elmore and W. W. King, for the appellant.

MARTIN, J. The plaintiffs state that they made an advance to the defendant on 293 bales of cotton, shipped by the latter to their house in New York, on whom he gave his draft, and that there is a loss of \$1,335 30, which is still due them. The defendant resisted the claim on an allegation that the plaintiffs' house in New York utterly disregarded his instructions as to

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the sale of the cotton. He did not admit that the sale had taken place; and averred that he had lost five thousand dollars by the conduct of the house, which he urged in compensation and reconvention. The first judge was of opinion that the plaintiffs had established their claim, and that the defendant does not appear to have ever given positive orders for the sale of the cotton at any specified time; that a consignee under advances is never unwilling to sell and reimburse himself; and that a consignor, who seeks to hold him to strict liability, must establish and prove positive orders.

An objection was made to the suit being brought on an account, when it ought to have been on the bill. It was disregarded, on the ground that the account had the bill as an item thereof in the nature of an advance, the proceeds of the cotton as the item of credit, and the difference was the amount claimed.

We have closely examined the record, and are of opinion that the judge did not err.

Judgment affirmed.

RIVARDE V. H. W. PALFREY.

Security for the costs of the clerk of the Supreme Court is not required by any law, but by a rule of court. Under this rule the clerk may refuse to receive the transcript, unless security be given. But if received, without objection on account of want of security, he cannot afterwards consider the transcript as not filed, at least until the appellant has been put in default, by a demand of security.

THIS was a rule taken by the appellant on the plaintiff, to show cause why a certificate of the clerk of the Supreme Court, that the transcript of the record had not been filed within the time prescribed by law, should not be cancelled on the ground of error.

Micou, for the appellant.

Denis, for the plaintiff.

MARTIN, J. The defendant and appellant obtained a rule on the plaintiff and appellee, to show cause why the certificate of the clerk of this court, that the transcript had not been filed on

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the third judicial day after that on which the appeal was returnable, should not be recalled and cancelled, on the ground that it was issued in error, and that security for costs would have been given had not an agreement between the parties prevented it.

The appeal was returnable on the 7th of April. Conversations between the parties induced the clerk of the first court to delay the completion of the transcript until the 14th, when, the hope which had been entertained, that an amicable settlement would dispense with further proceedings in the case, appearing to have been abandoned, he delivered the transcript to the clerk of this court. The latter, on the same day, seeing the defendant himself, informed him of this circumstance, inquired who were his sureties, and was answered that the matter was settled, but that defendant would see his attorney. The defendant's attorney had very early prepared the bond for the clerk's costs. It does not appear that he had any other notice of the transcript having been brought up, nor of any demand for the bond, except the enquiry made by the clerk, from his client, of the names of his sureties. The certificate was delivered to the appellee on the day immediately following that on which the transcript was brought up.

The appellant does not appear to have been guilty of any *laches*. He did not bring up the transcript; the clerk of the Parish Court filed it. It is true security was not given to our clerk for his costs; but no law requires it, and a rule of court alone has made provision for it. This authorizes the clerk to refuse to receive the transcript, when unaccompanied with security; but does not authorize him, after he has taken it without objection, to consider the transcript as not filed, at least not until the appellant is put in default, by a demand of security, and he refuses to give it. Of this there is no evidence. It is true that, seeing the appellant shortly after, the clerk asked him the name of his surety, and was answered that the matter was settled, but that appellant would see his attorney. On these facts, we are of opinion that the appellee was too hasty in his application for, and the clerk in the delivery of, the certificate.

The rule is, therefore, made absolute.

AMBROSE LANFEAR v. JOHN HUNT.

A purchaser of real estate cannot be affected by any agreement respecting its sale, made between his vendors and a former owner of the property, which was unknown to him at the time of the purchase, and not registered.

APPEAL from the Commercial Court of New Orleans, *Watts, J. Benjamin and Micou*, for the plaintiff.

Wharton, for the appellant.

MARTIN, J. This suit is on a note of the defendant's, duly protested. He admitted the execution of the note, but pleaded that it was given, with another note of his, now in the possession of the plaintiff, to De Rham and others, for the purchase of certain property in this city, to which he acquired no title, the sale having been made in violation of an agreement between Ogden, a former owner of the premises, and Deluze and Volz, his vendees, and the vendors of De Rham and others, who had bound themselves to comply with the agreement aforesaid.

The statement of facts shows that the plaintiff was a party to, and received the notes under the act of sale by which the defendant acquired the premises from De Rham and others, the vendees of Deluze and Volz.

Deluze and Volz, in their sale to De Rham and others, stipulated, "that the premises were subject to an agreement heretofore made with Ogden, their vendor, respecting the sale thereof." This agreement is not included, nor is any mention made thereof, in the sale from Ogden to Deluze and Volz. It was made in triplicate, one of which was to be deposited in the office of the notary before whom the sale from Ogden to Deluze and Volz was passed. This deposit, however, was never made.

The court gave judgment for the plaintiff, being of opinion that the defendant's title cannot be affected by the private agreement which was unknown to him at the date of the purchase, and not registered in any public office; and farther, that there was a *substantial* compliance with the stipulations of said private agreement.

On the examination of the case we have concurred with the first judge as to the effect of the agreement upon the title of the

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defendant, or rather as to the right of the plaintiff. We have thought it useless to examine whether there was a sufficient compliance with the agreement, for this is a matter between the parties thereto, and no concern of the present plaintiff and defendant.

Judgment affirmed.

THE STATE v. THE PARISH JUDGE OF PLAQUEMINES.

The jurisdiction of the Supreme Court being appellate only, and limited by the Constitution (art. 4, § 4) to civil cases in which the matter in dispute exceeds three hundred dollars, it cannot issue a *mandamus* to an inferior tribunal where the amount in dispute is under that sum. A *mandamus* can be issued by the Supreme Court only in aid of its appellate jurisdiction. C. P. 829, 839.

RULE to show cause why a *mandamus* should not be issued to the parish judge of the parish of Plaquemines.

Lombard, for the applicant.

Dutillet, parish judge of Plaquemines, showed cause against the rule.

SIMON, J. On the petition of the plaintiff in a suit pending before the Parish Court of the parish of Plaquemines, representing that the judge of said court, without any legal cause, refuses to try, and decide the said cause, a rule was issued, directed to the said parish judge, commanding him to show cause why a peremptory *mandamus* should not be issued.

The judge answered, that the reason why he recuses himself, and refuses to try the cause, is, that he is *unfriendly* to one of the parties.

On the return of the rule, it was stated before us, by the counsel of one of the parties, and assented to by the other, that the case in which the *mandamus* was sought to operate was not within our jurisdiction, as the matter in controversy therein was under three hundred dollars; whereupon we informed said counsel that we could not take cognizance of his application.

By the first section of a law of 1840 (Acts of 1840, p. 135), the jurisdiction, in civil cases, of the Parish Court of Plaquemines, was extended to the sum of \$3,000; and it was further

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provided, that judgments rendered by said court for all sums below \$300 *should be final and without appeal*; and that, when over three hundred dollars, appeals might be taken directly to the Supreme Court. Now, according to the constitution of the State, our jurisdiction is an appellate one *only*, extending to all civil cases when the matter in dispute shall exceed the sum of \$300; and by the terms of articles 829 and 839 of the Code of Practice, a writ of *mandamus* must be issued by a court of competent jurisdiction, and can only be directed to a tribunal of inferior jurisdiction by the court which exercises appellate jurisdiction over the former. Thus, it is clear, that having no appellate jurisdiction in this case, we cannot grant the *mandamus* applied for, and that to do so would be a violation of the constitution.

We have uniformly held, that the authority given to this court by the Code of Practice, to grant writs of *mandamus*, must be considered in relation to the constitution, which allows to this court appellate jurisdiction only; and its mandates should be confined to matters which have a tendency to aid that jurisdiction. 2 La. 89. 8 Ibid. 80. Here, how could we say that the writ applied for has a tendency to aid our jurisdiction, since, the matter in dispute being under \$300, the case could never be brought before us by appeal.

Rule discharged.

THE CITIZENS' BANK OF NEW ORLEANS v. THE LEVEE STEAM COTTON PRESS COMPANY.

Action by a bank, in liquidation under the acts of 14 and 26 March, 1842, to recover the amount of a dividend due on stock held by it in another corporation, to which it was indebted in a larger sum for money on deposit: *Held*, that the claim of the bank was discharged by compensation. Act 5 April, 1843, s. 2.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Denis and Pitot*, for the appellants.
Eustis, for the defendants.

MORPHY, J. The defendants having declared a dividend of five per cent on their stock, in September, 1843, were sued for

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\$615, accruing to the petitioners, as owners of one hundred and twenty-three shares of the said stock. To this demand the defendants pleaded compensation, alleging that the Citizens' Bank was indebted to them in a large amount of their own notes, and they tendered their check on the bank for the amount claimed. There was a judgment below in favor of the defendants, and the bank appealed.

The evidence shows that the defendants have had large amounts of money deposited in the Citizens' Bank, and still have to their credit in that bank a sum equal to the amount claimed in this suit. The judge below properly allowed the plea of compensation. His decision accords with that made by this court in the case of *The Commissioners of the Exchange and Banking Company of New Orleans v. Mudge and another* (6 Robinson, 387, 397), and is based on an express provision of the law of 5th April, 1843, to facilitate the liquidation of the property banks. It provides, that it shall be the duty of each of the banks of this State, at all times, to receive in offset, or part offset of debts due to it, its own debts, when liquidated and part due, whether for circulation, deposits, or arising from any other source whatever, and whether such bank be or not in liquidation, and without reference to the date at which the debtor offering such tender may have acquired the claim by him offered in offset. Acts of 1843, p. 56. It is urged by the counsel for the bank that, a dividend having been declared by the company, all the stockholders should be on an equal footing, and that the plaintiffs should not receive less than the others. When the bank receives in payment of their dividend their own notes or obligations, they cannot be said to receive less than the other stockholders, or to be placed on a different footing. Compensation might, in the same way, be opposed to any other stockholder indebted to the company. If, in availing themselves of this plea, the defendants avoid a loss on the amount due to them by the bank whose notes are depreciated, it is an advantage in which all the stockholders participate; whereas, if compensation were not allowed, the bank would receive a larger dividend than the other stockholders, because, with the money received from the defendants, they could pur-

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chase their own notes to a larger amount than the dividend declared.

Judgment affirmed.

JUAN PRESAS v. DOMINIQUE LANATA.

A sale of the contents of a coffee-house or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only.

APPEAL from the Parish Court of New Orleans, *Maurian, J. Canon*, for the plaintiff.

Latour and Roselius, for the appellant.

MORPHY, J. The defendant, a judgment creditor of one Ramon Planas, sued out an execution against his debtor, which he caused to be levied upon a coffee-house and grocery store in the possession of the plaintiff, who held it under an authentic act of sale from the said Ramon Planas. This action is brought to recover \$10,000, as damages, which the plaintiff says he has sustained in consequence of the seizure, which he alleges to have been maliciously made by the defendant, to ruin and harass him, and to destroy his standing as a merchant, &c. The answer avers, that the defendant, having obtained a judgment against Planas for a large amount, did cause to be seized a certain coffee-house, or cabaret, at the corner of St. Anne and Levée streets, to satisfy his judgment; that, at the time of said seizure, the coffee-house was in the possession of the said Ramon Planas, who had always been known as the owner of the same; and that, after the seizure had taken place, the plaintiff having exhibited a sale of the property from Planas, the defendant ordered the sheriff to desist, and to proceed no further with the execution. The answer further charges, that the store has never ceased to belong to R. Planas; that the sale to plaintiff is a sham and simulated one; and that, in executing said sale, Presas did connive and combine with Planas to defraud the defendant and his other creditors. There was a

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judgment below for fifty dollars against the defendant, from which he has appealed; and the appellee has prayed that the judgment may be so amended as to allow him the full amount of the damages claimed.

A great deal of evidence has been adduced on both sides in relation to the possession of the store at the time of the seizure. On an attentive examination of it, we think that it preponderates strongly in favor of the plaintiff. It establishes that about two months before the levy, the coffee-house and store were sold to the plaintiff, by Planas, its former proprietor, by a notarial act of sale; that the plaintiff took possession of the premises, put up his name on the street door, took out a license in his name, and obtained a lease from the owner of the house, &c. It is true that some witnesses say, that Planas continued to remain about the store, and to be seen there up to the time of the seizure; but this is accounted for by the witnesses, who declare that he was there acting in the subordinate capacity of a clerk, and that his assistance was needed by Presas, who had never kept an establishment of the kind. It is further shown that it was the plaintiff who made all the purchases necessary for the store, received the rent from some sub-tenants in the house, and on all occasions acted as the owner of the store. If the sale was a fraudulent and simulated one, as it is alleged, the defendant should have brought a direct action to set it aside. It was, nevertheless, a sale binding on third parties until declared null in due course of law; and the possession of the vendee was a legal one which should have been respected. The defendant had no right to treat the conveyance to Presas as a nullity, and to seize upon the property; by doing so he has made himself liable to the present action. 5 Mart. N. S. 361, 634. 6 Ib, N. S. 139, 325. 2 La. 214. 5 La. 126. Whatever impression we may have derived from the testimony in relation to the alleged simulation of the sale, we have not examined it with a view to pass upon that question, which we understand is pending in another suit between the same parties; but we have considered it as offered in mitigation of the damages claimed, and think that it fully justified the judge in allowing the plaintiff only nominal damages. The defendant does not appear to us

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to have been actuated by the malicious feelings imputed to him. Having always known Planas as the owner of the store, and seeing him in it, he might well have believed that he was yet the owner, and accordingly directed the sheriff to seize it; but the property remained under seizure only a short time, for as soon as plaintiff's sale was exhibited to him he discharged the seizure. No serious injury is shown to have been sustained by plaintiff, in consequence of the defendant's illegal act.

Judgment affirmed.

JAMES C. DECAMP v. JAMES HEWITT and others.

Where one employed as salesman by the year, at a fixed salary, is discharged before the end of the year, without any serious ground of complaint, he will be entitled to his salary for the whole term for which he was engaged.

APPEAL from the Commercial Court of New Orleans, *Watts, J. C. M. Randall*, for the plaintiff.

C. M. Jones, for the appellants.

MORPHY, J. The defendants have appealed from a judgment which condemns them to pay to the plaintiff \$1,057 85. This sum is claimed on the allegation that on or about the 8th of January, 1844, the defendants engaged the services of the plaintiff as a salesman in their commercial house, for the term of one year from that time, at a salary of \$1200 a year; that on or about the 12th of March following, the defendants discharged him from their employment without any just cause, and refused to pay him the aforesaid salary for one year, in violation of their contract, although the petitioner tendered to them his services for the balance of the year for which he had been engaged, and that they paid to him only the sum of \$142 15, leaving yet due the balance now claimed. The defence set up is, that the defendants had a right to turn off the plaintiff as they did, because he was utterly useless to them as a salesman, being incompetent to discharge his duties as such, and not possessing the necessary skill, attention and industry.

This case presents only a question of fact, to wit, whether

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the plaintiff was competent to discharge the duties he undertook to perform for the defendants? A number of merchants of high standing, all well acquainted with the plaintiff for a long time, and some of whom had had him in their employ, testified to his uncommon industry, activity and general knowledge and experience as a salesman of western produce; and it appears that the defendants themselves were well aware of his merits as a salesman, for, more than a year before they actually employed him, they expressed the desire of having his services, saying that he was just such a person as they wanted. It does not appear that at the time of discharging plaintiff, or previously, they intimated to him, or expressed to others any dissatisfaction with him; and when they made out their account with him, they allowed him a month's salary beyond the time they intended to keep and did keep him. On the trial, the defendants attempted to show the incompetency of the plaintiff, by proving that he committed various errors in making entries of his sales in the blotter, from which the book-keeper carries the accounts into the regular books. The errors complained of are represented by the witnesses as unimportant, and such as commonly occur, and cannot be prevented in that kind of business, which is generally done in a hurry. They say that these errors, which sometimes occur in every house doing such an extensive business as that of the defendants, are generally rectified by the principal, or the clerk who makes out the bills. The defendants also complain that the plaintiff refused to carry out the particulars of the sales made by him from the blotter into the sales book; but the plaintiff has proved by several witnesses that it was no part of his duty, as a salesman, to do so. On an attentive examination of the whole evidence, we see no reason to differ from the judge below in the conclusion to which he came.

Judgment affirmed.

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TILGHMAN W. WEST V. JESSE PLAIN.

APPEAL from the District Court of the First District, *Buchanan, J. S. L. Johnson*, for the plaintiff.

Bartlette, for the appellant.

MARTIN, J. The defendant is appellant from a judgment on his note. His principal defence is that the suit originated by process of attachment issued on an affidavit which he alleges is insufficient and untrue, and that the court erred in giving judgment for interest at the rate of more than eight per cent.

The plaintiff's affidavit states the amount of the debt, and that the defendant is on the eve of leaving the State forever, and conceals himself to avoid being cited. The latter has made a vain effort to disprove the allegations of the plaintiff, who has corroborated them by testimony.

The note sued on bears date the 9th of September, 1843, and calls for interest at the rate of ten per cent. The act of the legislature reducing the rate of conventional interest to eight per cent, is of the year 1844.

Judgment affirmed.

DENIS PRIEUR V. THOMAS GIBBES MORGAN.

Action by a collector of the customs at New Orleans who had been removed, to recover from his successor one half of the commission of one per cent allowed to the collector on the amount of certain bonds for duties on imports, the bonds having been taken by the plaintiff, but their amounts paid to his successor, to whom the whole commission was allowed on settlement of his accounts with the treasury: *Held*, that the act of Congress of 7 May, 1822, sec. 9, having declared that whenever the emoluments of the collector of the customs at New Orleans, and certain other ports, shall exceed a fixed sum, after deducting the expenses of the office, the excess shall be paid into the treasury, plaintiff must show that he has not received the maximum allowed by law, before he can maintain an action.

APPEAL, by the plaintiff, from a judgment of the District Court of the First District, *Buchanan, J.*, in favor of the defendant.

GARLAND, J. The plaintiff was appointed collector of the customs at New Orleans, in the year 1839, and took charge of the

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office on the 5th of August of that year. On the 12th July 1841, he was removed from office by the President. The defendant is his successor. At the time of plaintiff's removal, two entire quarters and twelve days of the third quarter of the current year had elapsed. He handed over to his successor bonds in favor of the United States, to secure the payment of import duties, to the amount of \$429,540 82, the commission on which, at one per cent, is \$4,295 41. Of this sum the plaintiff claims one half. In the settlement of his accounts with the treasury, the defendant has been credited with the whole of the commission, the bonds being paid after his appointment. This suit was brought to recover \$2,147 70, being half of the commission. The defendant avers that the plaintiff is not entitled to recover, having been removed from office; and he denies generally the allegations.

The act of Congress of 1799, relative to the compensation of the collectors of the customs, gives a certain fee for taking bonds, and when the money is collected, it allows a commission of one per cent to the collector; and there is a further provision, that if a collector takes the bond, and dies or resigns before it becomes due, and his successor receives the money, then the commission is to be divided between the collector receiving the money, and the one who has resigned, or the representatives of the one deceased. 3 Laws of U. S., chap. 129, secs. 2, 4.

In 1822, Congress passed another act limiting the compensation of the collector at New Orleans, and some other ports, to certain sum, and directing them to pay all over that sum into the treasury, after deducting certain expenses. 7 Laws U. S., p. 81, sec. 9.

Judge Story has decided (2 Sumner's Reports, p. 576), that the collector is not bound to pay any thing into the treasury, until he shall have received a sum, deducting the expenses, exceeding the *maximum* allowed, and that decision seems to have been acquiesced in by the United States. The record in this case does not inform us, whether or not the plaintiff, in the fiscal year preceding his removal, received the *maximum* allowed, or not. If he has, it seems to us that he ought not to recover, because then he would have a greater compensation than the law

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allows. To ascertain this fact, we think the case ought to be remanded for a new trial.

In 4 Mason's Circuit Court Reports, p. 119, the same learned judge extended what he calls the equity of the statute of 1799, sec. 4, to a collector whose term of office had expired by its own limitation, who was renominated to the Senate, and rejected. The present case, is an attempt to press the equity of the statute to a collector removed from office. It is admitted that the statute does not include the case in terms. In remanding the case, we express no opinion on that point.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the case be remanded for a new trial, the appellee paying the costs of the appeal.

Claiborne and Grymes, for the appellant.}]

Morgan, pro se.

PIERRE ALEXANDRE GUILLOTTE v. THOMAS TOBY, Syndic of the Creditors of John H. Martinstein, an Insolvent.

Plaintiff having purchased two lots of ground described in the act of sale as "*formant islets*," and situated in a certain division marked on a plan deposited in the notary's office, sued the occupier of a contiguous lot to cause a street to be opened. No street was mentioned in the act of sale to plaintiff, nor was any parol evidence offered to prove the existence of one at the time of the sale. An old plan was produced as being the one referred to in the sale, on which the street was marked; but there was no proof that it was marked thereon at the time of the sale, while there was evidence, on the face of the plan itself, showing that other streets described on it, had been marked at a subsequent period. *Held*, that the evidence was insufficient to prove the dedication of a street, of which no mention was made in the sale.

• **APPEAL** from the District Court of the First District, *Watts, J. Buisson and Soulé, for the appellant.*

Lockett, for the defendant.

SIMON, J. The plaintiff avers that having, on the 29th day of October, and 9th of December, 1811, purchased of the Ursuline Nuns, certain lots of ground situated in the upper part of the city, being formerly a part of the plantation known under

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the name of the Nuns' plantation, said lots were separated from the other lots of ground belonging to his vendors, and since sold to one Urbain Gaienné, by a road or street forty-two feet wide, and running from St. Marie street to Félicité street, called Guillotte street, established and proved as well by the titles as by the plan of division of the said Nuns' plantation, deposited in Wm. Christy's office for reference; but that said street, separating his property from that of his vendors sold to Gaienné, is not opened, and that the proprietors of the lots sold to Gaienné have taken possession of the same as their own, refusing to abandon and open it as a street. He prays that said street may be opened, and that all obstacles to its free use be destroyed and taken away.

The defendant, as syndic of the estate of Martinstein, an insolvent debtor, to whom the lots adjoining those of the plaintiff belong, first denied the right of the plaintiff to interfere in this matter, alleging that such right belongs properly to the public corporation within which the street is situated, &c.; and he further averred, that, according to the title deeds of both parties, the lines of their respective lands join, and that neither of said deeds calls for, nor specifies any street or vacant space of ground.

Judgment was rendered below in favor of the defendant, from which the plaintiff has appealed.

The acts of sale from the Ursuline Nuns, to the plaintiff, dated the 29th of October and 9th of December, 1811, and passed before a notary public, specify, 1st: That the vendors sell to the vendee, "*deux lots de terre, formant îlets, situés sur la rive gauche du fleuve à prendre dans les lots numeros deux et trois du plan déposé dans notre office, et de la contenance, l'un de 239 pieds 6 pouces de face au chemin qui le sépare de la propriété acquise par M. Teinturier, 300 pieds sur les chemins St. André et Ste. Marie, et dans la profondeur aux terres des dames venderesses, du côté du fleuve; et l'autre de 250 pieds de face au même chemin, attenant la propriété de M. Teinturier, sur 300 pieds aux chemins Ste. Marie et Félicité, et dans la profondeur aux terres des dames venderesses du côté du fleuve.*" And 2d: "*Deux lots de terre, formant îlets, à prendre dans les lots numeros deux et trois du plan déposé en notre office, et de la contenance qu'ils contiennent à partir*

de deux lots précédemment acquis par l'acquéreur, sur une profondeur de 300 pieds du côté du fleuve aux chemins Ste. Marie et Félicité, et dans la profondeur des terres des dames venderesses, &c. et sont connus du sieur acquéreur qui les prend dans l'état où'ils se trouvent," &c.

The sale from the same vendors to Gaienné, from whom the defendant holds, executed on the 6th of March, 1842, before the same notary, describes the property sold to be: "*un lot de terre situé sur la rive gauche du fleuve, à prendre dans le No. 3 du plan déposé en notre office, en suite d'un des lots acquis par M. Guillotte, ayant 370 pieds de face à la rue Félicité, 370 pieds à la rue Ste. Marie, 266 pieds de profondeur du côté de la borne dudit sieur Guillotte, et 281 de profondeur sur le parallèle côté du fleuve, suivant le certificat d'arpentage dressé par F. V. Potier, ingénieur et arpenteur juré, sous la date du 5 courant, lequel est demeuré et joint-annexé aux présentes pour y avoir recours au besoin.*"

Thus, on the one hand, the plaintiff's lots, purchased about fifteen months previous to the sale to Gaienné, to be taken in the lots Nos. 2 and 3 of the plan deposited in the notary's office, were to extend 300 feet *in the depth of the lands* of the vendors, and were well known to the purchaser who took them *in the state in which they were*; whilst, on the other hand, Gaienné acquired his lot also to be taken in the lot No. 3 of the plan deposited in the same notary's office, as being a continuation (*en suite*) of one of the plaintiff's lots, and having 266 feet *in depth on the side of said plaintiff's boundary*, according to the certificate of survey, dated the day before the sale, and annexed to the act for reference.

No parol evidence has been adduced to show the existence of the street in question at the time of the plaintiff's purchases, and we have been referred to an old plan made by B. Lafon, on the 18th of September, 1810, somewhat disfigured and blotted, as being the one alluded to in the sales; but the street contended for is not mentioned, nor in any way alluded to in said sales, and although there appears to be one marked on the old plan with the name of *Guillotte street*, there are others marked on the said plan with their names, which, on the face of the plan itself, could not exist at the time said plan was made; for in-

stance, there is one named *Gaienné street*, and the evidence proves that *Gaienné* only bought in 1812. This would show that *Gaienné street* did not exist in 1810, and that it has been marked on the plan since. Nothing proves that *Guillotte street* was marked on the plan at the time of the sales; on referring to the acts, we find that said plan is not referred to (as in the sale to *Gaienné*.) for the purpose of showing the boundaries of the lots; it is only mentioned therein to identify the lots sold, as being lots Nos. 2 and 3 of the plan and no further; and we are very far from being satisfied that the plaintiff, whose sales are silent as to the existence of said street, bought the lots as being bounded on one side by it. The plan itself, in the state in which it is, and without any written description of its marks, is not sufficient to prove the dedication not indicated, nor mentioned in the deeds.

Indeed the contrary is shown by *Potier's plan* made in 1812, which appears to be a neat copy of *Lafon's*. This plan, according to which *Gaienné* purchased his lot, does not contain the street contended for, and very few, if any, of the other streets are named thereon. *Gaienné* purchased his lot as a continuation of the plaintiff's, with 266 feet in depth on the side of said plaintiff's boundary, according to *Potier's certificate of survey*; and from a comparison made of it with the old plan, we are induced to believe that it is the true and correct one, under which all the sales were made. It may be that the street sued for existed, or was intended at the time of the plaintiff's purchase. This might perhaps be inferred from the lots being sold as "*formant islets*," but the evidence is insufficient to prove the fact; the plaintiff must make out his case, and it is not enough that he makes it probable. It is not a little astonishing that he should have suffered twenty-five years to elapse before claiming the opening of a street, which, he says, was dedicated in 1810, but which, in 1812, was excluded from a plan under which the subsequent sales were made.

Judgment affirmed.

Succession of Risley.

SUCCESSION OF RICHARD S. RISLEY—HENRY S. RISLEY, Appellant.

One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor; but such an assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferee before that date, and the policy remained in the possession of the assignor. C. C. 1804, 2612, 2613.

The assignor of a debt is not divested of title, as to third persons, before notice to the debtor; till then the assignee has but an inchoate right. C. C. 2613.

APPEAL from the Court of Probates of New Orleans, *Bermudez, J.*

MORPHY, J. On the 10th of May, 1841, Richard S. Risley had his life insured for \$5000, at the office of the Ocean Insurance Company, for the space of one year. He died within the time covered by the policy, on the back of which he had endorsed, at different dates, four several assignments for \$1,000 each, one in favor of Mills Judson, one in favor of his brother Henry S. Risley, and two in favor of Benjamin J. Leedom. Of these assignments, that in favor of Judson, and one of the two in favor of Leedom were approved of by the Company, while the others had not been notified to then at the time of the death of the insured. The underwriters paid the full amount of the policy. John W. Andrews, the executor of the deceased, considering as complete the two transfers approved by the office, agreed that \$1,000 should be received by Judson; and having received himself the remaining \$4,000 with the consent of the other assignees, to avoid all delay and difficulty on the part of the Company, he paid a thousand dollars to B. J. Leedom. The balance of \$3,000, he carried to the credit of the succession of Richard S. Risley in the account which he subsequently rendered in the Court of Probates. In this account which shows the estate to be insolvent, he placed Leedom and H. S. Risley as ordinary creditors of the deceased, for \$1,000 each. Henry S. Risley opposed the homologation of the account, averring that he is the only person entitled to the \$1,000 transferred to him on the policy, and that the creditors of the estate have no right or title to any portion of said sum, for which he prayed to be declared a privileged cred-

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itor. B. J. Leedom claimed a similar privilege for the two thousand dollars transferred to him by the deceased, alleging that the sum apparently paid to him had been appropriated to pay another debt of Risley's. Oppositions were made by other creditors, and by Leedom, to various items of the account, which it is unnecessary to notice as they have been passed upon below, and no amendment of the judgment thereon has been prayed for in this court. In relation to the claims of Leedom and Henry S. Risley, the probate judge was of opinion that all the transfers made by the deceased should be disregarded as being *contra bonos mores*, and as giving an undue preference to some of the creditors over the others; he, therefore, refused the privilege prayed for, and ordered that the executor should account for the full sum of \$5,000, being the amount of the policy, in lieu of the \$3,000 which he carried to the credit of the succession. From this judgment Henry S. Risley appealed. Benjamin J. Leedom prayed for an amendment of the judgment, so as to place him on the tableau as a privileged creditor for \$2,000, instead of the \$1,000 allowed him as an ordinary creditor; and the executor prayed that it might be so amended as to debit him with no greater amount than that which he has credited to the succession.

We cannot agree with our learned brother of the Court of Probates, that the transfer of a life policy by the person insured, to one or more of his creditors as collateral security, has any thing in it *contra bonos mores*. In France, and other countries of Europe, it is true, insurances on life were for a long time held illegal, and were even expressly prohibited. According to a maxim of the civil law, the life of a free man was deemed above all valuation—*liberum corpus æstimationem non recipit*; and the French commentators, with the single exception, perhaps, of Pardessus, inveigh against such policies as being gambling contracts of the worst kind; but even in those countries, the practice of life insurance, which is now so prevalent in England and in the United States, begins to be viewed in a different light, and life insurance companies have been established in several places. Their usual purpose, says chancellor Kent, is to provide a fund for creditors, or for family connections, in case of death.

"A *bonâ fide* creditor has an insurable interest in his debtor's life to the extent of his debt, for there is a probability, more or less remote, that the debtor would pay the debt if he lived. A person may insure his own life for the benefit of his creditors, or he may insure the life of another in which he may be interested, and assign the policy to those who have an interest in the life," 3 Kent, pp. 366-367. When the assignee has a legal and direct pecuniary interest in the life of the insured, and the evidence satisfies us that such an interest existed in this case, we can see nothing immoral in the transfer of a life policy to him as collateral security. 2 Marshall, on Insurance, p. 766. 12 Massachusetts Reports, p. 115. As to the undue preference which these transfers may give to the transferees over the other creditors, it is sufficient to say, that no revocation of them, on that ground, has ever been demanded by the executor or any of the creditors, and that more than one year has elapsed from the date of these transfers, and from the appointment of the executor. Civil Code, arts. 1982, 1989.

The only question then which this case presents is, whether the assignments made to the opponents are valid, although no notice was given to the insurance office during the life time of the assignor. It is urged that as this policy does not contain the ordinary clause that no assignment shall take place without the consent of the underwriters, but, on the contrary, promises to pay \$5,000 to the insured, his executors, administrators and assigns, no such consent was necessary to render the transfers binding on them. Admitting this to be true as between the assignees and the office, the question yet remains, have these transfers without notice to the company, before the death of the insured, vested any rights in the opponents, to the prejudice of his other creditors? We see nothing that should take this case out of the general rule laid down in article 2613 of our Code, that the transferee of a debt, or other incorporeal right, is only possessed, as regards third persons, after notice has been given to the debtor of the transfer having taken place. The preceding article provides that in the transfer of debts, rights, or claims on a third person, the delivery takes place between the transferer and the transferee, by the giving up of the title. In this case,

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the policy remained in the possession of the transferrer. No notice whatever of the transfers was given to the Insurance Company, and it is not even shown that such transfers were accepted by the transferees before the death of Richard S. Risley. Civil Code, art. 1804. Under these articles of the Code, it has been repeatedly and uniformly held, that the assignment of a debt vests in the assignee only an inchoate right, and that the assignor is not divested, as regards third persons, until notice be given to the debtor. *Cox v. White*. 2 La. 425. *Carlin v. Dumartrait*, 5 Mart. N. S. 21. *Bainbridge v. Clay*, 4 Ib. N. S. 56. It has been held in England, says Phillips, on Insurance, that life policy are assignable so as to give a right of action in the name of the assured, and they are frequently assigned as security for loans. It has been held, however, that where a policy was assigned, without notice of the assignment to the insurers before the bankruptcy of the assured, the property in the policy passed to the assignees. 1 Phillips, p. 38, and the authorities there quoted.

It is urged by the appellant that, in receiving the money from the underwriters, Andrews acted not as executor, but as his mandatary to collect it, and wrongfully converted it to the use of the estate. If this were true, he might at best have a personal action against Andrews; but the record shows that the latter, as executor, had notified the company not to pay any of the transferees; that this opposition was subsequently withdrawn with regard to the two transfers approved and recorded on the books of the office; that the appellant authorised Andrews to receive the money which the company was unwilling to pay to him; and that Andrews receipted for it to them as executor. This course was clearly pursued to avoid all delay and difficulty, and with the understanding, no doubt, that the rights of the parties to this money should be afterwards settled in due course of law.

In relation to the \$1,000 received by Leedom under his approved transfer, it appears from the evidence that \$825 of this sum were paid in his discharge to J. W. Zacharie, who held a draft drawn upon Leedom by the deceased, and which he had accepted; that this draft was drawn and negotiated by the deceased entirely for his accommodation, and at a time when he

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was indebted to Leedom. For this amount, the latter is, we think, entitled to a credit on the tableau as an ordinary creditor.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates, be so amended as to debit the executor with no larger amount than that which he has carried to the credit of the succession, and to place Benjamin J. Leedom on the tableau as an ordinary creditor of the deceased, for \$1,825, instead of \$1,000; and that it be affirmed in all other respects, with costs.

Hornor, for the appellant.

Barker, for Leedom.

Winthrop, for the executor.

GEORGES LAGRANGE V. ZEPHYRIN C. BARRE and others, Heirs of Zephyrin Barré, deceased.

A condition inserted in an act of donation *inter vivos* of all the donor's property, that the donee shall, without charge, supply the donor during his life with clothes and food, and, in case of sickness, with medical attendance, and shall bestow on him all the care which children would bestow on a parent, cannot be considered as a reservation of enough of the donor's property for his subsistence, within the meaning of art. 1484 of the Civil Code. Such a donation is null for the whole. *Per Curiam*: The donor must keep in his own possession and ownership enough of his property for his subsistence. The mere promise of the donee to support the donor is insufficient. C. C. 1520, 1547.

A single decision, particularly where the point in controversy does not appear to have been thoroughly investigated, is insufficient to settle the jurisprudence of the country. Where the value of the object given exceeds by one-half that of the charges, or services, imposed on the donee, the donation cannot be considered as an onerous one, to which, under art. 1513 of the Civil Code, the rules peculiar to donations *inter vivos* do not apply.

Excessive or inofficious donations—actions for the reduction of which are prescribed by five years, where the person entitled to exercise them is in the State, and by ten years if out of it, under art. 3507 of the Civil Code, are those dispositions which fathers and mothers, or other ascendants make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law. C. C. 3522, s. 21.

An action to annul a donation *inter vivos*, in consequence of the donor's not having reserved property enough for his subsistence, is not prescribed by five years. From considerations of public order, such a donation is declared, by art. 1484 of the Civil Code, to be absolutely null.

APPEAL from the District Court of the First District, *Buchanan*, J.

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Lagrange, the petitioner, represents that, on the 16th of September, 1834, he made to Zephyrin Barré, by public act, a donation *inter vivos* of all he possessed, to wit, a tract of land and five slaves, on the condition that the donee should furnish him with food, bedding, clothes, fire, lights and medical attendance, free of any charge, during the petitioner's life. That on the 25th of December, 1839, Z. Barré died, leaving certain heirs and a widow in community, the defendants in the present action; that since Barré's death, the defendants have neglected to comply with the condition of the donation, and have, by their bad treatment, insults and outrages, compelled him to quit their house, thus leaving him entirely destitute, and authorising him to claim the revocation of the said donation; and that the donation is null and void, he having thereby divested himself of all his property, real and personal. The petition alleges that Barré had sold the land to one Valbuzi Cavelier, a free man of color, for the price of \$800; that the defendants are in possession of the slaves, and of the said sum of money; that he has a right to claim \$60 a month, as the wages of the slaves, and legal interest, at five per cent a year, on the sum of \$800, from the period of the defendants' failure to comply with the conditions of the donation, i. e. from the 1st of January, 1841. He also claims \$1500 for damage suffered by him since he was compelled to leave the defendants' house. The petition concludes by praying that the act of donation may be annulled, the property given to Barré restored, and for the wages, interest, and damages claimed by him. He also prays that Cavelier may be made a party to the action, and condemned, with the defendants, to restore the land; and for general relief, &c.

The defendants admitted that a donation had been made of the land and slaves to Barré, but averred that it was not a gratuitous, but an onerous donation, and that the rules concerning gratuitous donations are inapplicable to it. They deny that they have ever refused to comply with the conditions imposed on them by the donation, and allege that they have always fulfilled, and are still willing to fulfil said conditions. They aver that the plaintiff did not divest himself of all his property, but reserved enough for his subsistence; deny that they have caused any

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damage to him ; and pray, as to the plaintiff's demand, to be dismissed with costs. In a demand in reconvention defendants claim, in case judgment should be rendered against them, \$4,000 from the plaintiff, for necessities supplied for his use during eight years, from September, 1834, till the beginning of 1843, when plaintiff voluntarily left their house.

The case was tried without a jury. The plaintiff introduced in evidence the act of donation to Barré, dated 16th Sept. 1834, and the sale from Barré to Cavelier of the land, dated the 6th May, 1837. The former recited that the donor, wishing to prove his friendship for his nephew, Z. Barré, thereby made to him a donation of five slaves, and of a tract of land having a front of one *arpent* and a half on the Mississippi river, with a depth not precisely known, the whole tract being bounded by the estates of certain contiguous proprietors whose names are mentioned, and on the following conditions : *First*, that the donee shall pay all the expenses of the act ; *Secondly*, that he shall pay all the taxes or other charges to which the property is, or may be subject ; *Thirdly*, that he shall support all the servitudes with which the said land may be charged ; *Fourthly*, to execute any leases, or contracts of hire, which may have been made of any of said property ; *Fifthly*, to furnish the donor with food, bedding, linen, fire, and lights during the donor's life, and, in case the donor should fall sick, that the donee and his servants shall bestow on him all the attentions which children would show to a father, and cause him to be attended by the physician of the family, all free of any charge against the donor. The act declares the land given to be worth \$700, and the slaves \$2,200.

The act of sale to Cavelier showed that the land was sold for \$800.

It was admitted on the trial that, at the time of the donation, the plaintiff was possessed of no other immovables or slaves than those included in the act. No proof was offered to show whether he had, at that time, any moveable property whatever. Several witnesses were examined both on the part of the plaintiff and defendants, to prove the annual expense of boarding and clothing the donor in the style in which he had been accustomed to live, and the character of the treatment he had received from

the defendants since the death of Z. Barré. The witnesses for the plaintiff estimated the expense of his support at \$100 a year, or less. One of the witnesses for the defendants, an overseer in their employment, deposed that he would not undertake to support the donor for less than \$400 a year, while another witness on the same side, declared that \$200 was amply sufficient. The testimony was contradictory as to the treatment of the plaintiff, since the death of Z. Barré. One of the plaintiff's witnesses testified that negroes, in ordinary condition, were hired in the parish in which defendants reside, at from \$120 to \$140 a year.

The District Court annulled the donation; declared the slaves to be the property of the plaintiff; and gave judgment in his favor against the defendants, heirs of the donee, for their virile portion of the hire of the negroes from judicial demand till paid, at the rate of \$100 a year for each slave, and of the price of the land (\$800,) which had been alienated by their ancestor, with legal interest thereon from judicial demand; and for costs. The defendants appealed.

St. Paul, for the plaintiff. The donor having divested himself of all his property, the donation is null. Civil Code, arts. 1484, 1515. The condition imposing on the donee the duty of maintaining the donor, is not a sufficient reservation to render the donation valid. The thing reserved, says Gomez, p. 445, must be "*res vel quantitas notabilis et non ita parva, tenuis et minima*"—such as would be worth disposing of by will. A stipulation that the donee shall maintain the donor does not change a gratuitous into an onerous donation. Dalloz, Dict. de Jurisprud. vol. 2, verbo Donation, p. 135, nos. 9, 10. 4th Bruss. Ed. 6 Pothier, Traité des Fiefs, vol. 11, pp. 362, 381. Though there had been no stipulation that the donee should support the plaintiff, he would be bound to do so, and his failure would render the donation null. Civil Code, art. 1547, §3. It is on the defendants to show that the donor possessed other property; he cannot be required to prove a negative—that he had none. By art. 1513 of the Civil Code, it is declared that the rules applicable to donations *inter vivos* shall extend to onerous donations, where the value of the thing given exceeds by one-half that of the charges imposed. The cost of supporting the donor in this case is shown

to have been about \$100 a year, while the income from the property given by him, each slave hiring for \$100 a year, must have exceeded \$500.

Art. 1484 of our Code is taken *verbatim* from the 69th law of Toro, Novissima Recopilacion, Lib. x, tit. 7, ley 2. Instituto Civil y Real (Berni) page 86, Lib. 11. tit. 7. Asso y Manuel, Instituciones del Derecho Civil de Castilla. Tom. 2. Lib. 11, tit. 9. § 11. Fuero Real, Lib. 3, tit. 12, ley 6. In Febrero, Novissimo ó Libreria de Jueces, tom. 2, cap. 22, § 5, the wisdom of the 69th law of Toro is thus explained. "La razon es porque ademas de quedarse el donante sin lo necesario para su manutencion, se priva del derecho de testar, y se puede dar ocasion el donatorio paraque maquine la muerte del donante con el fin de apoderarse prontamente de sus bienes." And further on: "No conviene en el orden publico que los hombres sean prodigos." The provision of the law of Toro was afterwards inserted in a somewhat different, though not less explicit form, in Martinez, Libreria de Jueces, tom. 7, p. 176. § 98, in these words: "Ninguna persona puede hacer donacion de todos sus bienes, aunque diga que la hace y sea solamente de los presentes; y si la hiciere es nula e inoficiosa."

When it is considered that the framers of our Code had, while preparing it, these very laws before them, as well as the Code Napoleon, and that these provisions are not to be found in the latter, we must conclude that they intended that such donations should be, as in the Spanish law, absolutely null; otherwise, art. 1484 is without any meaning.

Forcelle, for the appellants. The defendants have complied with the conditions of the donation, except so far as they have been prevented by the plaintiff himself. "*La condition apposée à une donation est réputée accomplie, quand le donateur en a empêché l'exécution.*" Guilhaon, Traité des Donations, vol. 2, p. 54, no. 593. The reservation in the donation was sufficient. "On peut donner tous ses biens," says Domat, vol. 1, p. 303, no. 8, "pourvu qu'il y ait une reserve d'usufruit, ou d'autre chose qui suffise pour la subsistance et l'entretien du donateur." The Spanish authorities are to the same effect. "*La donacion* [de todos los bienes] será tambien válida si el donatorio se obliga á mantener al do-

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nante mientras viva. Tapia, Febrero Nov. vol. 2, p. 464, no. 5. See also the case of *Vicks v. Deshautel*, 9 Mart. p. 85, which was decided while the Spanish laws were still in force, in which there was the same restriction as in art. 1484 of our Code. Moreover, the defendants have never been put *in mora*. Civil Code, art. 1906 *et seq.* The action is prescribed by five years (Civil Code, art. 3507), the donation having been made in the 16th Sept. 1834.

St. Paul, in reply. The case from 9 Mart. is inapplicable. There the contract was an onerous one. The quotation by the appellants' counsel from Febrero, is not more happy. That author, *loco citato*, declares that the donation might be valid should the donee oblige himself to maintain the donor during his lifetime, but he adds, "enterrarlo segun su calidad y cumplir lo que disponga en su testamento." Art. 3507 of the Civil Code speaks of *inofficious* donations—not of such donations as the one sought to be annulled in this action. See *Tippet et al. v. Jett*, 3 Robinson, 313. 1 Vazeille, des Prescriptions, Bruss. ed. 1834, p. 224, ch. 11, nos. 545, 546. Troplong, des Prescriptions, vol. 2, p. 310, § 786 *et seq.*; p. 323, § 800, (Paris ed). Merlin, Repert. de Jurisp. verbo Prescription, sect. 1, § 6, art. 1, du Titre Vicieux. See also *Duplessis v. Kennedy*, 6 La. 235. Civil Code, arts. 12, 1887, 1889. Against the plaintiff the prescription of ten years runs only from the time when the defendants ceased to comply with the conditions of the donation. Civil Code, arts. 1554, 3511.

SIMON, J. The object of this controversy, is to obtain the revocation and nullity of an act of donation *inter vivos*, executed by the plaintiff in favor of the defendants' ancestor, on the 16th of September, 1834. He, therefore, demands that all the property by him given to the deceased, be restored to his possession and ownership; that he may be compensated for the rents and profits, wages and interest which said property may have yielded during the time he was deprived of its enjoyment; and that the defendants be also condemned to pay him \$1,500 damages.

The defendants answered that the donation was not a gratuitous, but an onerous one; that they have always fulfilled, and still are willing to fulfill all the conditions imposed upon their

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ancestor by the said donation ; that the plaintiff has not entirely divested himself of all he possessed ; and that he has brought himself within the limits of the law, by reserving to himself enough for his subsistence. They further pleaded a reconventional demand against the plaintiff for the sum of \$4,000, due them for having furnished him with all the necessaries of life from the date of the donation, in case judgment should be rendered against them in the premises.

The district judge decided that the donation should be declared null, that the slaves thereby donated should be restored to the plaintiff's possession and ownership, and that the defendants should pay him, jointly, a certain amount for the yearly hire of each slave, since the date of the institution of this suit, as also the price of a tract of land comprised among the property donated, but since sold by the donee ; and from this judgment the defendants have appealed.

The evidence shows that the donation was executed on the 16th of September, 1834, comprising a tract of land and five slaves, with the following stipulated charge, to wit : "*De nourrir le donateur, de lui fournir le lit, linge, feu, lumière, sa vie durant, et encore à condition que si le donateur tomboit malade, ledit sieur Barré et ses domestiques lui donneront tous les soins que des enfans donneroient à leur père, et le feroit visiter par le médecin de la maison, le tout sans qu'il puisse en rien couter au donateur.*" The tract of land was sold by the donee, in May, 1837, for the sum of \$800 ; but the slaves are yet in the possession of the defendants, as heirs of the donee.

The appellee's claim is based upon the fact that the land and the slaves comprised all the property which he possessed, and that, consequently, the donation is void by the 1484th article of the Civil Code ; and he also sets up that the heirs of the donee have neglected to comply with the obligations stipulated in the contract, of supporting and treating him as children should treat a parent.

The defence rests upon the allegations of the donor's not having entirely divested himself of all he possessed, as he reserved to himself enough for his subsistence ; that the donation is not a gratuitous, but an onerous one ; and that defendants have

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always fulfilled the conditions therein stipulated; and also upon the plea of prescription of five years. Hence, two principal questions arise:

1st. Does this donation come within the meaning of article 1484 of our Code, as being prohibited by law?

And 2d. Is the action to have it declared null, prescribed by the lapse of five years from its date?

I. Art. 1484 of the Civil Code is in these words: "*The donation inter vivos shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole.*" The terms of this law appear to throw a certain incapacity upon every citizen to dispose and divest himself of all his property by donation *inter vivos*, and declare that such donation shall be null (not reducible), if he has not reserved to himself *enough* of his property for subsistence. The expression, *reserve to himself*, cannot be understood to mean that he should rely upon others for his subsistence, but that he should himself keep in his possession and ownership a sufficient portion of his property to provide for his subsistence. This seems to be the spirit of this law, as it would be vain to say that the mere promise of the donee to support the donor is a sufficient reserve in the sense of article 1484, since the same obligation, without any contract on his part, is imposed upon him by article 1547, which gives to the donor the right of revoking the donation, if the donee *refuse him food when in distress*—"lui refuse des alimens, lorsqu'il est dans le besoin." Thus, it is manifest, that the law maker never intended that on a simple stipulation of alimony, a man should divest himself of all his property by donation *inter vivos*. He must keep a sufficient amount for his subsistence; and we are confirmed in this opinion by article 1520 of the Civil Code, which does not permit that a donor should reserve to himself the usufruct of the property given; and this is certainly more than a mere stipulation, or promise of alimony, on the part of the donee.

Article 1484 of our Code appears to have its origin in the 69th law of Toro, the text of which is: "*Ninguno pueda hacer donacion de todos sus bienes, aunque la haga solamente de los presentes.*" Noviss. Recop. lib. 10, tit. 7, ley 2. Instituto Civil y

Real, (Berni) p. 86, lib. 11, tit. 7. Asso y Manuel, Instituciones del Derecho Civil de Castilla tom. 2, lib. 11, tit. 9, § 11. Fuero Real, lib. 3, tit. 12, ley 6. Gomez, in his commentary on the law 69 de Toro, in speaking of the portion the donor must reserve to himself, informs us that it must be : "*Res vel quantitas notabilis, et non ita parva, tenuis et minima.*" Febrero Noviss. ó Lib. de Jueces, tom. 2, cap. 22, § 5, commenting on the 69th law of Toro, says : "*La razon est porque ademas de quedarse el donante sin lo necesario para su manutencion, se priva del derecho de testar, y se puede dar ocasion al donatario para que machine la muerte del donante con el fin de apoderarse prontamente de sus bienes.*" And further, he says, that, "*No conviene en el orden publico que los hombres sean prodigos.*" So, also, it is found in Martinez, Lib. de Jueces, tom. 7, p. 176, § 98, in these words : "*Ninguna persona puede hacer donacion de todos sus bienes aunque diga que la hace y sea solamente de los presentes ; y si la hiciere es nula e inoficiosa.*" It is perfectly clear from these authorities, that the mere obligation on the part of the donee to support the donor is not sufficient to make a donation *omnium bonorum* valid, and as they are in concordance with our laws on this subject, we feel no hesitation in adopting the same doctrine.

It has been urged, however, that the question is not new in our jurisprudence ; and that a similar question was passed upon by this court in the case of *Vick v. Deshautel*, 9 Mart. 85, where a similar donation, with a promise by the donee to support the donor, was held valid. The quoted case does not decide any such thing ; and if it did, it was rendered under the old Civil Code, in which no such prohibition is found, and the question does not appear to have been investigated under the Spanish laws then in force. Moreover, article 50, p. 220 of the Code of 1808 permitted the donor to reserve for himself the usufruct of the property by him donated ; a disposition which is now prohibited by article 1520 of the new Code ; and, as we have often said, it requires more than one decision to establish the jurisprudence of a country, particularly when, in a solitary one, the point in controversy does not appear to have been thoroughly investigated and examined. The quotation from Febrero, relied on by the appellants' counsel, to wit : "*Pero si el donante se*

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reserva para se por toda su vida el usufructo de sus bienes, (which is prohibited by our Code,) y los suficientes de que poder testar libremente, y el usufructo es competente para su manutencion, será valida, como tambien si el donatario se obliga a mantener al donante mientras viva, enterrarlo segun su calidad y cumplir lo que disponga en su testamento—rather shows that the mere obligation of the donee to support the donor, is not sufficient; that something else is necessary, consisting in the donee's obligation to give effect to the dispositions contained in the donor's last will or testament; and surely this necessarily implies, that the donor has reserved to himself some property which may be the subject of his testamentary dispositions—that is to say, "*los suficientes de que poder testar libremente.*"

Now it is admitted in the record that, at the time of the donation, the donor was not possessed of any other property, immovables or slaves, but that included in the act of donation. The appellants have not shown that he had any personal or immovable property which he could reserve to himself, and it is obvious that this donation was really one "*omnium bonorum*" prohibited by our law. With regard to the point that the donation under consideration was not a gratuitous, but an onerous one, we think it is untenable. Under art. 1513 of the Civil Code, the value of the object given must exceed by one half that of the charges; and we agree with the judge *a quo* in the opinion that the annual rent and profits of the things donated, not to speak of their value as estimated in the contract, are clearly shown to be more than double the amount of the charges imposed upon the donee.

II. We now come to the question of prescription. The appellants' counsel relies upon art. 3507 of the Civil Code, which says: "*The action of nullity, or rescission of contracts, testaments, and other acts; that for the reduction of excessive donations, &c, are prescribed by five years, when the person entitled to exercise them is in the State, and ten years, if he be out of it.*" Disposing first of the question arising from the second provision of the law relied on as applicable to this case, we have only to say; that this is not an action for the reduction of an excessive donation; that an *inofficious* or excessive donation, means the disposition which

fathers and mothers, or other ascendants, make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law (Civil Code, art. 3522, § 21); that such donations retain all their effect during the life of the donor (Civil Code, art. 1490); and that the action to have them reduced, only belongs to the forced heirs of the donor, to be exercised, after his death, against the donee or his heirs. Civil Code, arts. 1489, 1491, 1504. See also 1 Vazeille, Prescription, page 224, nos. 545, 546 *et seq.*

There remains then the first provision of art. 3507, which, the appellants contend, is applicable to this case. We have already seen that art. 1484, under which this action was instituted, prohibits this kind of donation in an absolute manner. It says that it shall be *null for the whole*; and thus declares that no legal effect whatever can be given to such dispositions. Febrero, *loco citato*, says: "*No conviene en el orden publico que los hombres sean prodigos*;" and we have already said that the terms of the law throw a certain incapacity upon every individual of disposing, and divesting himself, of all his property by a donation *inter vivos*. Art. 12 of our Code says that, "whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed;" and, in the case of *Gasquet v. Dimitry* (9 La. 590), this court, in examining a question relative to a contravention of a prohibitory law, in which the nullity of the act is not formally expressed, said: "In every well organized State, those laws which establish the order of hereditary succession, which regulate the capacity to dispose by last will, (here it is by donation *inter vivos*,) would seem to stand first in rank of those rules involving the great interest of public order, and essential to the welfare of society." Here, the nullity of the disposition is expressly declared in the law itself, and it would seem strange indeed that, notwithstanding this positive provision, persons incapacitated by law from making a particular donation—from extending their liberality, nay, their prodigality to divesting themselves of the whole of their property, should become capable, after five years from the date of their donation, under a law which declares the act to be absolutely null. The maxim, "*Quod ab initio vitiosum est, non potest tractu temporis convalescere*"

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ere," is clearly applicable to the matter at issue. Merlin, *Repertoire*, verbo Prescription, s. 1, § 6, art. 1, says: "*Quand le titre est frappée d'une nullité absolue, point de prescription;*" and Vazeille, Prescription, No. 540, expresses his positive opinion: "*Que les conventions et les dispositions contraires aux bonnes mœurs, ou à l'ordre public sont frappées d'une nullité qu'aucune prescription ne sauroit effacer.*" See also Troplong, Prescription, No. 132. That the nullity pronounced by art. 1484 is based upon motives of public order, and that the act done in contravention of its prohibition is against good morals, can hardly be doubted, and will be easily understood. Is it not against public order, as Febrero says, that a man should extend his prodigality to divesting himself of the whole of his estate? Is not excessive prodigality injurious to the prosperity of families, and to the good order and welfare of society? It is not against good morals that a citizen should strip himself of his means of subsistence, and turn himself out as a beggar upon the community; or, if he is to depend upon the indefinite promise of another, that he should have to rely not only upon the will and caprices of a stranger, but also to subject himself to the contingency of the latter's always possessing sufficient means to provide him with the necessities of life? The 11th art. of our Code says, that individuals cannot, by their conventions, derogate from the force of laws made for the preservation of public order or morals. Such derogation, according to art. 12, to a prohibitory law, is void. The law on which this action is based, declares the absolute nullity of the disposition, and we are of opinion that such nullity cannot be removed, nor cured by the prescription of five years.

On the whole, we think that the judgment appealed from is fully supported not only by law, but also by the evidence, and that it should not be disturbed.

Judgment affirmed.

* *Forcelle*, for a re-hearing. The donation should not be annulled. Plaintiff has proved that he had, at the time of the donation, no other immovables or slaves; but he has not shown, that he had *no other personal property*. The *onus probandi* is on the plaintiff. See Toullier, vol. 4. p. 96, nos. 76, 77, 84, in his commentary on art. 911 of the Code Napoleon, which is identical with art. 1478 of the Civil Code of this State.

Re-hearing refused.

SUCCESSION OF SARAH BAUM—JOHN D. FINK, Dative Testamentary Executor, Appellant.

All the effects or property in the possession of the spouses, or either, at the time of the dissolution of the community by death, are presumed to belong to the community. C. C. 2374.

The heirs of a wife may renounce the community, for the purpose of exonerating themselves from the debts contracted during the marriage (C. C. 2379); but the husband, having been the head thereof, can never do so, either directly or indirectly.

Where a commission to take testimony is addressed to a resident of another State by name, as a special commissioner, he becomes an officer of the court for that purpose, and no proof is required of his qualifications to discharge the duties imposed on him.

Where the facts intended to be proved under a commission, taken out by parties who intervened for the purpose of prosecuting the suit for their own benefit, as creditors of the plaintiff, on an allegation that he was about to abandon it, go to support the allegations of the petition, the plaintiff cannot exclude the evidence, on the ground that he had no opportunity to cross-examine the witnesses.

Where the rights of a plaintiff in an action against a succession have been seized under a *fi. fa.*, he cannot discontinue.

The creditors of one who had commenced an action against a succession, claiming to have been the husband of the deceased, and to be entitled, as such, to one half of the property in her possession at the time of her death as community property, may intervene and prosecute the claim, where they apprehend that the plaintiff is about to abandon it for the purpose of defrauding them. C. C. 1985.

Where one claiming under a *fi. fa.* produces the judgment, execution, sheriff's return thereon, and act of sale, it will be presumed that the formalities of the law have been complied with. It is for the other party to show that they have not been complied with.

An action having been commenced by a party to cause himself to be recognised as the husband of the deceased, claiming his portion of certain property as having belonged to the community, his creditors intervened, praying to be allowed to prosecute the suit, on the ground that plaintiff was about to abandon it for the purpose of defrauding them. A supplemental intervention was subsequently filed by the same parties, alleging, that since the date of their intervention, they had purchased all the rights of the plaintiff in the action, and praying to be allowed to prosecute it to a decision. On an exception that the supplemental intervention set up a new cause of action, and was therefore inadmissible: *Held*, that the supplemental intervention does not in any manner change the substance of the original demand that the plaintiff be recognized as the husband of the deceased, but merely the parties to the proceedings, and that it should be received. C. P. 364.

Plaintiff having commenced an action against a succession to cause himself to be acknowledged as the husband of the deceased, neglected for more than three years to take any steps in it, when certain creditors intervened, praying to be allowed to prosecute the action on the ground that the plaintiff was about to abandon it for the purpose of defrauding them. The latter subsequently attempted to discontinue, but his

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motion was overruled. *Held*, that the prescription of one year established by art. 1989 of the Civil Code is inapplicable to the claim of the intervenors, who do not seek to revoke any contract or act of any kind, but simply to intervene in an action for the protection of their rights.

APPEAL from the Court of Probates of New Orleans, *Bernu-
dez, J.*

Hoffman, for the appellant.

F. B. Conrad and *J. C. Clarke*, for the intervenors.

H. D. Ogden, for Kellar.

McHenry, for Powell.

SIMON, J. The judgment appealed from in this case by the *da-*
tive testamentary executor of the estate of Sarah Baum, deceased,
and also complained of by John Kellar, the original plaintiff in
the action, decides, that said *John Kellar was the lawful husband*
of Sarah Baum; that all the effects possessed by said Kellar and
the deceased are common *acquests*; and, accordingly, orders that
an inventory of the property held by them at the dissolution of
the community be made before a notary public, and appoints
two appraisers for that purpose.

For the better understanding of the subject in controversy,
it is first necessary to advert to certain facts which preceded
the death of Sarah Baum, which happened in March, 1839; to
dispose of the question of marriage upon which this suit was in-
stituted; and to examine the course of conduct of the plaintiff,
with regard to the interest by him claimed in the community,
since the decease of his wife.

The evidence shows fully that John Kellar and Sarah Baum,
lived together as husband and wife, in Shippingport, Kentucky,
in or about the year 1818, and subsequently, after having been
married in a neighboring State. They resided at that place un-
til about 1821, when they both went away, and it was generally
understood at Shippingport that they went to New Orleans.
Two witnesses, who were examined in Kentucky, prove that
they were present at the marriage ceremony, and that it took
place at Clarksville, in Clark county, in the State of Indiana,
opposite to Shippingport, before Jacob Brookhart, Esq. who, as
the witnesses state, was acting as a justice of the peace at the
time of, before, and after said marriage. After their arrival in

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New Orleans, they were generally considered as man and wife; they lived together in the same house; one of the witnesses says he was always in the habit of calling Sarah Baum, "Mrs. Kellar;" that she was known by that name; and that they had the reputation of being man and wife. Another witness states that he became acquainted with Kellar, about the year 1827; that, about that time, he came down the river with Kellar and his reputed wife; that she was called Mrs. Kellar; and that he, witness, was introduced to her as his, Kellar's, wife. She lived with Kellar until the time of her death; and although another witness, who proves that she was called in New Orleans "Mrs. Kellar," and that he heard her husband call her by that name, states in his testimony that she was not called so in Louisville, and that he thinks she was not married, we cannot hesitate to say that the fact of the marriage of Kellar with Sarah Baum is fully and satisfactorily established by the testimony, and that, from the evidence, there can exist no doubt of her being Kellar's wife at the time of her death.

It is clear, therefore, that John Kellar was the head, or master of the community which had legally existed between him and Sarah Baum; that said community was dissolved by the death of the wife, in March, 1839; and that all the effects and property then in the possession of the spouses, or of either of them, are necessarily presumed to belong to the said community. Civil Code, art. 2374. The heirs of the wife had the privilege of renouncing the partnership or community of gains, to exonerate themselves from the debts contracted during the marriage (Civil Code, art. 2379); but the husband, being the head and master thereof, could never do so, either directly or indirectly.

It appears, however, that some time before the death of his wife, there was a suit brought against Kellar for a debt of his contracting, in a chancery court in Kentucky, (the record of which, though produced in evidence in this suit, is not in the record,) in which, Kellar's deposition was taken to *disprove his marriage* with Sarah Baum, (this deposition is not in the record,) and that the deceased wrote to him from Louisville, on the 17th of July, 1831, the following instructions, clearly relating to said suit: "Mr. D. . . , has sent those depositions down in a letter

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directed to me, and I want you to go to the office and take the letter out, and open it, *take the depositions to D. . . , and you and him state that I am not your wife, and that the property is mine.*" This letter, which wants no comment as to the object for which it was written, shows conclusively that Kellar's deposition, which has not been furnished to us, was nothing but a false statement of facts which he knew to be untrue; and if it is true that he swore that he was not married to Sarah Baum, it is obvious that his only object was to comply with the instructions of his wife, for the purpose we presume of protecting his property from being seized, or otherwise taken from him. Had Kellar's deposition been before us, we should have thought it our duty to disregard it.

But it further appears that Kellar soon lost sight of his false deposition, for the present suit was instituted by him on the 14th of May, 1839, against the testamentary executor of the estate of Sarah Baum, for the purpose of claiming, *as the lawful husband of the deceased*, to be recognized as entitled to his share of the community property, whether in his, or his wife's name, and of causing an inventory thereof to be made. Kellar's petition was answered by the testamentary executor, on the 28th of May, 1839, denying all the allegations of the plaintiff's petition, and referring to the suit in Kentucky, as evidence of his not being the lawful husband of the deceased, *from his own declaration* as a witness therein, &c.; and the present suit remained unacted upon on the docket of the court *a qua*, until the 4th of November, 1842, when the New Orleans Canal and Banking Company, being creditors of the plaintiff Kellar, by virtue of certain judgments duly transferred over to the said company, and fearing that their debtor, who was in insolvent circumstances, would desist from prosecuting his action, as he had refused to prosecute the same by taking no step therein for more than three years past, obtained leave to intervene and to prosecute and exercise the rights of their debtor, as husband and partner in community of Sarah Baum, contradictorily with the testamentary executor of the deceased, and with the tutor of her grand child and only heir, and prayed that Kellar might be recognised as the husband of the deceased, and joint owner of the community property, &c.

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On the 17th of December, 1842, Kellar obtained leave, on motion, to discontinue his case; but, on a subsequent motion made by the intervenors' counsel, and on his showing that, at the time the discontinuance was moved for and granted, the suit was under seizure, and on the eve of adjudication under a forced sale, the same was reinstated on the docket, and the order to discontinue was annulled and rescinded. The intervenors' petition was answered by the executor, who pleaded the general issue, and denied specially that Kellar was ever married to the deceased.

On the 16th of January, 1843, the intervenors filed a supplemental intervening petition, in which they set up that, on the 17th of December preceding, they purchased at sheriff's sale, at auction, all the right, title and claims of John Kellar to the present suit, pretending to be authorised, by virtue of said purchase, to procecute his said rights to a final adjustment and termination, and praying accordingly. This supplemental petition was also answered by the executor, who pleaded the general issue, excepted to the jurisdiction of the court, and averred that the proceedings under which the sale of Kellar's rights was made, were illegal and irregular, without any legal advertisement and appraisalment, and consequently null and void. The testamentary executor subsequently filed a plea of prescription, said to have been acquired previous to the filing of the petition of intervention.

The record further shows that, on the 31st of May, 1831, a suit was brought by one W. T. Huff, against John Kellar, in the Commercial Court, based upon the fact of the defendant's having employed him to procure the proof of his, Kellar's, having been lawfully married to Sarah Baum, in Indiana, and of his, plaintiff's, having succeeded in finding the necessary evidence to substantiate Kellar's claim under the said marriage, claiming from the latter the sum of \$1,500, as a just compensation for his services, according to a written agreement filed with the plaintiff's petition. Said petition is accompanied by a certificate and declaration of an individual, showing the marriage of Kellar with Sarah Baum, in Clark county, Indiana, and by divers letters written by Kellar and his counsel to the claimant, in May,

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June, and July, 1839, disclosing clearly that said claimant was employed by Kellar for the purpose of procuring the evidence necessary in support of the present action, and also that the circumstance of Kellar's deposition given in the chancery suit already alluded to, was the principal cause of his abandoning this suit. He, Kellar, says in one of his letters: "*From its tenor (alluding to his affidavit) I have given up the marriage action altogether, and have now taken a new turn upon them, which will place me in a better condition, &c.*" The defendant's answer, filed on the 19th of June, 1841, pleaded the general issue, and claimed in reconvention of the plaintiff the sum of \$1,000; and nothing shows that the suit was ever brought to trial.

The intervenors' claim under the sheriff's sale, as shown by the sheriff's return on the execution which issued on one of the judgments, is founded on the adjudication made to them on the 17th of December, 1842, of "all the right, title and claims of John Kellar in and to a certain suit now pending in the Court of Probates, entitled John Kellar v. The Succession of Sarah Baum, no. 1280 of the docket of said court, for the sum of \$50, which was applied to pay costs, &c." And the evidence also shows, that the intervenors became the transferees and owners of the judgments described in their petition, by an act of transfer executed in their favor by one Thomas Powell, on the 5th of August, 1841.

After this exposition of the pleadings and of the facts disclosed by the evidence, the first object of our inquiry grows out of a bill of exceptions taken to the opinion of the judge *a quo*, who permitted the depositions of certain witnesses, taken under a commission, to be read as evidence on behalf of the intervenors. The objections were: 1st, that it does not appear that the witnesses were sworn before a person qualified to administer an oath; and 2nd, that Kellar had no opportunity of cross examining the witnesses.

I. The commission is addressed to William Hardin, Esq., notary public, or any other judge, or justice of the peace in the county of Floyd, State of Indiana; and the testimony was taken by the said William Hardin, who states in his certificate, that "the witnesses severally *subscribed and swore to their respective*

depositions before me," and that their said depositions contain their full answers to all and singular the direct and cross interrogatories, &c. We have often held that when a commission is addressed to a person by name, in another State, as a special commissioner to take depositions, he becomes an officer of the court *ad hoc*, and that this dispenses with any proof of his qualification to discharge the duties imposed on him. 1 Mart. N. S. 187. 16 La. 282, 321. The judge, therefore, did not err in receiving the depositions objected to, as having been legally taken.

II. We agree with the judge *a quo* in the opinion, that the facts intended to be proved, to wit, the marriage of John Kellar with Sarah Baum, are in support of his allegations made in his petition as plaintiff, and that he cannot, therefore, be viewed as a party defendant.

On the merits, three questions have been raised by the appellant's counsel, which it becomes now our duty to examine. It has been contended: 1st. That the evidence does not support the allegations contained in the original and supplemental petitions of intervention.

2nd. That the supplemental intervention is based upon a new cause of action, and cannot be maintained.

3rd. That the plea of prescription should have been sustained.

I. We have already expressed our firm opinion that the marriage of John Kellar with Sarah Baum, deceased, was satisfactorily established, and that, from the evidence, we were satisfied that she was Kellar's wife at the time of her death. Indeed, we have rarely seen a case in which the main fact at issue between the parties, was more satisfactorily made out, not only from the direct evidence adduced to prove it, but also from all the other circumstances shown by the defendant, and intended to throw doubt upon its existence. Here, independently of the testimony of the witnesses who were present at the marriage ceremony, the conduct of the husband and wife in relation to a suit, in which it was deemed necessary, in order to practice a fraud, not only to deny the existence of the marriage, but also to show by the deposition of one of them, that it had never taken place, has had the effect of convincing us that they were really married, and that the declaration of the husband, was only the

result of the suggestion of his wife, and of a scheme by them formed to protect their property from seizure. They were married, but they contrived to prove that they were not; and had the fact of marriage not existed, where was the necessity of procuring evidence to prove a negative? The appellant, in endeavoring to rebut the appellees' allegations by this evidence, has proven too much, and has completed the proof of his adversaries, so far even as to show that John Kellar's conduct in that transaction is a good and sufficient ground to maintain the appellees' intervention in this suit, and to justify their allegations of fraud on which their original petition is based. It is obvious that Kellar, who joined the appellant in this appeal, and who therefore complains of the judgment which declares him to be the husband of the deceased, renews in this suit the attempt, which he made in Kentucky, to screen his property from the pursuit of his creditors, under the false pretence here that the whole belongs to his wife's succession. His application to discontinue his cause during the pendency of the intervention, evinces also, on his part, the intention of depriving his creditors of their recourse against his property, as he undoubtedly expected that, after having discontinued his action, the appellees' intervention would necessarily be dismissed; but, at the time of his attempt to discontinue, his litigious rights were under seizure; they were about being sold; he had no further control over them; and the judge *a quo* very properly rescinded the order of discontinuance thus illegally obtained.

We think, therefore, that the intervenors' allegations of intended fraud on the part of Kellar, have been substantially made out; that they had a right to intervene for the purpose of preventing the fraud, having shown themselves to be his creditors, and in danger of losing their rights from their debtor's fraudulent acts (Civil Code, art. 1985); and that all the allegations contained in the two petitions are fully supported by the evidence.

It has been urged, that the appellees have not proved that they have legally acquired the rights of Kellar, and that, as the regularity of the proceedings under the forced alienation were expressly put at issue, it was their duty to show their legality

beyond the judgment, writ of execution, and sheriff's deed, produced in evidence in support of their said rights. We think the contrary. The appellees having shown the adjudication made to them at the sheriff's sale, by the production of the judgment, writ of *fi. fa.*, and sheriff's return and deed, these were *prima facie* evidence that the formalities of the law had been complied with, and it was the duty of their adversaries to prove that they were not. This doctrine has been repeatedly and uniformly recognised in our jurisprudence. 3 La. 476. 5 Ib. 486. 9 Ib. 542. 16 Ib. 454. 18 Ib. 526. 19 Ib. 307. 2 Rob. 466. This point, however, is to some extent immaterial, as the sheriff's sale relied on may yet be disputed by Kellar's creditors, and even by Kellar himself, when the intervenors shall attempt to claim possession of the property, by virtue of said sale, contradictorily with their debtor, or with their co-creditors. It is not the main basis of the intervention, which we rather consider as made by creditors of an insolvent for the protection of their rights; and in this sense only can we take the sale relied on, as *prima facie* evidence of the intervenors' right to interfere.

II. This question, though hardly insisted on in the argument, deserves some consideration. It is true the supplemental petition of intervention sets up new matter, based upon a fact which occurred since the filing of the original petition; but it does not, in any manner, alter, nor change the substance of the original demand, to wit, that Kellar be recognised as the lawful husband of the deceased; it only shows that since the inception of the suit, the plaintiff had perhaps no further right to prosecute it in his name, and that his rights and claims had apparently been transferred to another. But the action remains the same; it operates merely a change of parties, for whose benefit it is to be acted on; and we are not prepared to say that if, during the pendency of a suit, a third person acquires the right of the plaintiff, the former should not be permitted to intervene, and claim that the suit be carried on in his name and for his benefit. A distinction ought clearly to be made between an original action, and one by intervention. The latter is rather an incidental demand, the cause of which may have originated since the original one was substituted, and has for

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its principal object the protection of the rights of the intervening party against the acts or contrivances of the original parties, or either of them, and even the exercise of a right contradictorily with both. Code of Practice, art. 364. For instance, if, during the pendency of a litigation between two persons, it happens that one of them has done an act which may be prejudicial to another's interest, or to his rights, the latter has a right to intervene, though the cause of complaint have arisen since the inception of the suit. So, also, if the third party becomes the transferee or purchaser of a litigious right before it is brought to a final adjustment, he has necessarily the right of intervening to claim that the suit be carried on in his name. Here, the two rights existed successively, both originating during the pendency of Kellar's action; but as they are not inconsistent with each other, and have a tendency to the same result, we cannot see any reason why the last cause of intervention should be disregarded. The authorities relied on by the appellant's counsel, 10 La. 424 and 516, are applicable to an original action; but we cannot say that they should govern an intervention, which, in most cases, presupposes an injury to be sustained by the intervenor from the acts of the original parties, or of one of them, during the pendency of the original suit. It is manifest that if the grounds or causes of intervention were to be limited to those existing previous to the institution of the main action, the rights of intervening parties would very often be defeated and sacrificed.

III. This point has been strenuously urged in the argument, but we think it untenable. The appellant's counsel appears to consider the appellees' intervention as a mere revocatory action, based upon article 1984 of our Code; and he has, therefore, contended, that it is prescribed by the lapse of one year. Civil Code, art. 1989. Now, supposing the intervention to have been instituted for that object, what is the contract or act to be revoked, and from what time would the prescription begin to run? It cannot be pretended that Kellar has ever made any formal renunciation of his rights in favor of any one, nor that the heirs of the deceased have ever acquired any right under him, to his portion of the community with the deceased. As we

have already said, being the head or master of the community, he could not legally renounce it, but could only make a transfer of his rights. Has he ever done so? At the time the original petition of intervention was filed, his suit was pending; it had been instituted for more than three years; and the intervenors complained of his neglect in not prosecuting it, as amounting to a desistance to their prejudice, and even to a renunciation of his rights to the property of the community. But it is nowhere alleged that Kellar ever did effectually renounce, so as to divest himself of his rights, in favor of the appellant: he merely neglected to avail himself of the action which he had instituted; such neglect might have become prejudicial to the exercise of the rights of his creditors, who had good reasons to believe that he intended to defraud them. But there is a vast difference between a fraud committed passively by a debtor in not exercising the legal rights from which his creditors could be benefitted, and the active fraud which, having the effect of divesting him of his rights or property in favor of a third person, gives rise to the revocatory action. This results from the very terms of article 1984, which says: "*Not only contracts which dispose of property, but all others (contracts) which are made in fraud of creditors, &c., come within the provisions of this section. The renunciation of a succession or other right of property, the release of a debt without payment, or any other act of this kind, may be avoided by creditors;*" &c. Here, again, no contract or act of any kind was ever performed or executed by Kellar; none such is sought to be annulled or revoked by the intervenors; the executor cannot set up any title to his portion of the community by virtue of any transfer made to him; Kellar's portion never ceased to be vested in him; and if, having neglected to prosecute his suit, on the 17th of December, 1842, during the pendency of the intervention, he attempted fraudulently to discontinue his demand, it was no cause for a revocatory action, but simply a good and legal ground to authorize his creditors to complain, and to intervene in the action for the protection of their rights. By the terms of article 1985, the intervenors were authorized to exercise all the rights which their debtor could, for recovering

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possession of the property to which he might be entitled, in order to make the same available for the payment of their debts. These rights the debtor had never explicitly abandoned until the 17th of December, 1842, when he moved for a discontinuance of this suit. His refusal, or neglect to prosecute his rights, cannot date but from the time of his motion, as until then the suit was pending in his name and for his benefit; and considering also, that the object of the refusal was not *to decline accepting an inheritance to the prejudice of his creditors*, but only to decline claiming possession of property, the title to which was in him for one-half, as master of the community to which he could not validly renounce, we are of opinion that the plea of prescription was properly overruled.

Upon the whole, we cannot recognise in the executor, after the fact of marriage was ascertained, any right to dispute and controvert the intervenor's legal pretensions. As representing the succession of Sarah Baum, he is entitled to the one-half of the property belonging to the community, and to nothing more; the other half belongs to John Kellar, or perhaps to the purchasers of his rights; and we cannot see any valid reason why the executor should have taken upon himself to complain of the judgment appealed from, any further than with regard to the original matter at issue between him and the surviving husband. He pretends to be entitled to the whole, notwithstanding the proof of marriage. This sounds very much like collusion between him and Kellar, for the purpose of depriving the intervenors of their just rights against their debtor. Kellar became the executor's co-appellant; but we feel authorized by the record to say, that this looks, on the part of the executor, like an attempt to assist him in the fraud which he intended to perpetrate, and that such conduct cannot receive any sanction at our hands.

Judgment affirmed.

Hazard v. The Agricultural Bank of Mississippi.

ROWLAND G. HAZARD v. THE AGRICULTURAL BANK OF MISSISSIPPI.

A final judgment rendered in another State between the same parties, where both were before the court, will be conclusive between them, on an application to render the judgment executory here. The plaintiff cannot be called upon again for proof of his demand.

The law authorizes those whose interests may be affected by an action pending between others, to intervene, and join one of the parties, or oppose both; but they cannot be compelled to do so. C. P. 389, 390. Act 7 April, 1826, s. 10. They may institute a separate action against either, or both of the parties litigant. C. P. 391. But should any of their rights be lost or impaired, in consequence of their neglect or failure to intervene, after notice of the proceedings likely to affect them, they must bear the consequences.

A garnishee is but a stakeholder; he has nothing to do, but to take care of himself. He cannot interfere between the plaintiff and defendant, nor others claiming what he holds or owns, but must pay to whomsoever the court may order him.

Where a debt due to defendants by a note secured by mortgage, had been transferred to third persons by a notarial act recorded in the office of the parish judge, but before notice of the transfer was given to the maker of the note, the debt was attached by a creditor of defendants, the attaching creditor will be entitled to be paid by preference out of the proceeds.

Debts due to a foreign corporation may be attached.

Where a petitioner alleges that defendants are indebted to him in a certain sum, for which he had recovered judgment against them in another State, and prays that they may be cited to answer, for judgment, and for an attachment, and he subsequently obtains an order rendering the foreign judgment executory in this State, he may have the latter order annulled, on motion, *ex parte*; and where defendants appear and answer to the merits, without excepting to the previous proceedings, any irregularities will be considered as waived.

APPEAL from the Commercial Court of New Orleans, *Watts, J.* The plaintiff represented that he had obtained a judgment, in a court of the State of Mississippi, against the defendants, a corporation created by a law of that State, for the sum of \$7,778 23, with interest and costs, and prayed that the bank might be cited, and judgment rendered against it for the amount so ascertained to be due. He further represented, that one Samuel Lambdin is largely indebted to the defendants, and prayed that he might be made a garnishee, and ordered to answer certain interrogatories; and that so much of the debt due by him as should be necessary to satisfy plaintiff's claim might be *sequestered*, and applied to the payment thereof.

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On the 21st March, 1843, the day on which the petition was filed, an *attachment* was taken out, which was served on the same day, "by attaching all the rights, lands, moneys, &c. of defendants in the hands of Mr. Lambdin." On the 7th of June following, plaintiff filed a transcript of the Mississippi judgment; and an order was entered, making "the said judgment executory in the State of Louisiana," and decreeing that "any property of the said defendants found therein be seized, and sold, to satisfy the said judgment and costs of suit."

On the 18th July, 1843, Lambdin filed his answers to the interrogatories propounded by the plaintiff, in which he states that he had no property of the defendants in his possession; but that one William Bisland and himself were indebted, *in solido*, to the defendants for the amount of a promissory note, signed by them, and dated at Vidalia, the 13th of December, 1842, made in favor of the President, Directors and Company of the Agricultural Bank of Mississippi, and for the amount of a bond given by Bisland and himself for the payment of interest on the note at the rate of eight per cent a year, from the 13th December, 1842, until paid. He adds, "that the note was transferred by the defendants to Brown, Brothers & Co., on the 15th of December, 1842, by an act of record in the office of the parish judge of the parish of Concordia; but that he did not know of the transfer till notified by Tyler and Henderson, trustees, on the 5th of April, 1843." This notice is annexed, in these words:

"Samuel H. Lambdin, Esq. "Natchez, Sept. 4, 1843.

"Sir:—We understand that you have been garnisheed as a debtor of the Agricultural Bank of Mississippi. We, therefore, as trustees of Brown, Brothers & Co., do hereby inform you, that the note given to the board of directors of the said bank by William Bisland and Samuel H. Lambdin, for \$42,425 87, dated 13th December, 1842, does not belong to the said bank, but is the property of Brown, Brothers & Co., together with the mortgage by which it is secured, and that the said note and mortgage are by us held, as the trustees of the aforesaid Brown, Brothers & Co., &c. &c. Respectfully yours,

"J. D. TYLER, }
"THOS. HENDERSON, } Trustees."

Lambdin's answers to the interrogatories were annexed to a petition, in which, after reciting the nature of his debt to the bank, he prays that he may be allowed to intervene; that Brown, Brothers & Co., through their agent residing in New Orleans, may be cited to appear and assert any rights they may have, or, on failing to do so, be debarred from ever afterwards setting up any claim or title to the note and bond sued on.

Brown, Brothers & Co. having excepted to answering, their exception was overruled on the 27th January, 1843, the court ordering them to answer within a time fixed, and "to assert their rights as against Lambdin, or be concluded by the judgment which may be rendered in the case."

Two days after, on the 29th of January, on motion of the counsel for Lambdin, contradictorily with plaintiff's counsel, the order rendered on the 7th of June preceding, "making the judgment on which this action was instituted executory, was annulled, as having been made through error, the original petition calling for a citation, answer and judgment."

The defendants answered by denying that the court has jurisdiction, that any property has been attached, or that plaintiff owns or possesses the notes originally sued on, and requiring their production.

Brown, Brothers & Co. answered, by alleging that the defendants are indebted to them in a sum exceeding the amount of Bisland and Lambdin's note; that that note was delivered to them to secure them against any loss on account of said debt, as stated in an act of subrogation from the Agricultural Bank, executed at Vidalia, 15th December, 1842. They deny plaintiff's right to attach, and require that he produce the notes on which he obtained judgment. They also pray for a judgment against Lambdin for \$42,425 87, with interest, &c., being the whole amount of the note executed by Bisland and himself.

Brown, Brothers & Co. annexed to their answer a copy of a notarial act executed before the parish judge of Concordia, on the 15th December, 1842, by J. D. Tyler, as president, on behalf of the Agricultural Bank, which, after reciting that the defendants are largely indebted to Brown, Brothers & Co., declares, "that, in order the more fully to secure the said Brown, Brothers

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& Co. against any loss or damage," &c., "the said J. D. Tyler, president, &c., does by these presents specially assign, transfer, pledge and deliver unto the said James Brown, for the purpose of securing the debts due by said Agricultural Bank to the said Brown, Brothers & Co., a certain promissory note for the sum of \$42,425 87, drawn, *in solido*, by William Bisland and Samuel H. Lambdin, of Adams county, Mississippi, dated at Vidalia the 13th day of December, 1842, and payable to the order of the President, Directors and Company of the Agricultural Bank of Mississippi, on the 13th of December, 1843, at the banking-house of said bank at Natchez, which said note is the consideration of a certain mortgage executed by said Bisland and Lambdin, by authentic act passed before the judge of the parish of Concordia on the 13th day of December, 1842, and paraphed by the said judge to identify it therewith, which said act is duly recorded in the office of said judge; and the said president, &c. further declared, that he doth hereby subrogate the said Brown, Brothers & Co. to all the rights of mortgage which he may possess under said act from Lambdin and Bisland."

In a sort of replication, termed by the counsel "an answer to the petition of Brown, Brothers & Co.," the plaintiff denied that any assignment had ever been made by the bank to Brown, Brothers & Co.; averred that any such transfer was forbidden by the laws of Mississippi; that no notice of a transfer was ever given to Lambdin, or Bisland, until after the attachment; that the bank was insolvent at the date of the alleged transfer; and that such transfer, if ever made, was never accepted by Brown, Brothers & Co.

It was admitted on the trial, that the Agricultural Bank was indebted to Brown, Brothers & Co. in the sum of \$446,856 61, on the 30th November, 1843; that they received from the bank a large amount of bills receivable and other assets, the nominal value of which was greater than the amount of the debt, but that enough had not been realized to pay said debt, and that the bank still owes them a sum greater than the amount in dispute in this suit; that no new consideration was given to the bank for the alleged transfer of the claim against Bisland and Lambdin, which was subsequent to the receipt of the said bills

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receivable; that judgments for a large amount have been rendered against the bank in Mississippi, on which executions have been issued, and returned, by the sheriff of Natchez, *nulla bona*; and that the bank suspended specie payment in 1840, and has not since resumed. It was admitted that the common law prevails in Mississippi, modified by statutes; and it was agreed that the laws of that State might be read in evidence.

The plaintiff introduced in evidence the record of his suit against the bank in Mississippi, with the execution issued thereon and return; Lambdin's answers to the interrogatories; the letter from Tyler and Henderson, notifying Bisland of the transfer of his note; and an act passed before the parish judge of Concordia, on the 13th of August, 1842, pledging and mortgaging to James Brown, acting on behalf of Brown, Brothers & Co., certain lands, slaves and other assets, in consideration of certain arrangements made by them, and for the purpose of securing the payment of the debt due to them by the bank.

Brown, Brothers & Co. offered in evidence the notarial act annexed to their answer.

There was a judgment below against the plaintiff as in case of nonsuit, from which he appealed.

Barker, for the appellant.

Peyton and *I. W. Smith*, on the same side. The attachment should be maintained. Serjeant on Attachment, 75. *Gibson v. Huie*, 14 La. 132. Defendants could not have transferred the note under the laws of Mississippi. See *Hyde et al v. Planters' Bank of Mississippi*, decided in this State, in July, 1844, and *Payne et al v. Baldwin*, decided by the High Court of Errors and Appeals of Mississippi, in November, 1844. Nor, consequently, under the laws of this State. *Frazer et al. v. Wilcox et al.*, 4 Robinson, 517. The payees of the note being a corporation disabled by law from transferring the note at the time it was made, or since, it never became negotiable, and could not pass by endorsement and delivery.

The contract under which Brown, Brothers & Co. claim, was one of pledge. Civil Code, arts. 3100, 3102. It was void, for it does not appear that the person who signed for the corporation was authorized to do so by the directors. *Ibid*, art. 3117. Nor

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could the corporation have made such a contract, being disabled by law. The pledgee never assented to the contract till after the attachment. Nor was the note delivered. *Ibid*, arts. 3119, 3129. Nor endorsed. *Ibid*, arts. 3123, 3128. *Chapman's Syndic v. Shelton*, 2 La. 277. The insolvency of the bank rendered the pledge void. Civil Code, arts. 1965, 1989.

Any irregularities growing out of the order making the Mississippi judgment executory, were waived by the answers to the merits. The bank had not lost all control over the debt at the time of the attachment, as the pledge had not then been accepted. Civil Code, art. 1974.

L. Pierce, for the defendants, and Brown, Brothers & Co. The attachment was abandoned by the prayer to render the Mississippi judgment executory. The plaintiff has nothing to do with the legality of the transaction between defendants and Brown, Brothers & Co. 17 La. 555. 1 Rob. 435. 2 Rob. 99. The bank had lost all control over the debt, and plaintiff cannot be in a better situation than the bank itself. 7 Mart. N. S. 137. 2 Rob. 253. Brown, Brothers & Co. were illegally called in by the garnishee. Hazard must bring a direct action against them, attach the debt in their hands, and enjoin the negotiation of the note; there would then be bond and security for damages.

GARLAND, J. The plaintiff having obtained a judgment in the Circuit Court of Adams county, Mississippi, against the Agricultural Bank, a corporation located in that county and State, for the sum of \$7,778 23, with interest thereon at the rate of eight per cent per annum, from the 14th of December, 1842, and costs, issued an execution thereon, which was returned "no property found"; whereupon he brought a copy of the record, and instituted a suit thereon in the Commercial Court, by attachment, making Samuel H. Lambdin a garnishee, to whom various interrogatories were propounded, for the purpose of ascertaining whether or not he was indebted to the defendants. The attachment was served on the 21st March, 1843, and the garnishee cited personally the same day.

On the 7th June, 1843, a judgment was rendered and signed by the judge of the Commercial Court, in which it is stated that, upon the production and filing of a duly certified copy of

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the record and proceedings in the Circuit Court of Adams county in the case mentioned, it was therefore ordered that the said judgment in favor of the plaintiff, against the defendants, be made executory in the State of Louisiana, for the sum therein mentioned, with interest and costs, and that any property of said defendants that can be found, be seized, and sold to satisfy the same.

In July, 1843, Lambdin appeared by counsel, and answered the interrogatories propounded to him. He says that he has no property belonging to the defendants in his possession, but that he and one William Bisland are indebted to said defendants, for which debt they, on the 13th of December, 1842, gave their note, *in solido*, to the President, Directors and Company of the Agricultural Bank of Mississippi, for the sum of \$42,425 87, payable twelve months after date, at the said bank, in Natchez; and that they also gave a bond at the same time, jointly and severally, promising to pay interest on the above-mentioned sum, at eight per cent per annum, from the date aforesaid. He further answered, that the note and bond had been, on the 15th December, 1842, by an act of record in the office of the parish judge of the parish of Concordia, transferred to Brown, Brothers & Co.; but that he did not know of such transfer or assignment at the time of the service of the attachment in this case, nor for some time subsequently, when he was notified of it by Messrs. Tyler & Henderson, trustees, on the 5th April, 1843, as will more fully appear by a letter annexed to the answers, which letter bears date *Sept. 4*, 1843. With these answers Lambdin files what his counsel calls a petition of intervention, in which he states the fact of being cited as garnishee, and his indebtedness as set forth in his answers; also the assignment of his note to Brown, Brothers & Co.; and he prays that they be cited, by their agent, Samuel Nicholson of New Orleans, to interplead and assert their rights, and if they fail to do so, after legal notice, that they be forever debarred from asserting any right or title to the note and bond described, and that he be preserved harmless from their neglect to appear and answer as required. Brown, Brothers & Co. were cited, and filed an exception to the jurisdiction of the court, averring that they

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could not be compelled to intervene in the action, nor could their rights be prejudiced by any judgment that could be rendered; but the court overruled their objections and compelled them to answer, although they are not residents of the State.

On the 29th January, 1844, on motion of the counsel of Lambdin, the garnishee, and contradictorily, as it is stated, with the counsel for the plaintiff, the court ordered that the judgment, given on the 7th June, 1843, making the judgment on which this suit is brought executory, be annulled, the same having been made through error; and it was also ordered, that counsel be appointed to represent the defendants, and that time be given them to correspond and answer. When this order was entered, the defendants were not represented, nor had Brown, Brothers & Co. answered to the merits. The counsel appointed by the court to represent the defendants, shortly after this, answered by a general denial; and, a short time after, the defendants appeared by counsel, and, without any exception to what had been previously ordered or decreed, alleged that the court had no jurisdiction, as no property of defendant's had been attached. It is further denied that the plaintiff owned the notes originally sued on, and their production is required. A few days after this answer was filed, Brown, Brothers & Co. answered that defendants were largely indebted to them, and that the note of Lambdin and Bisland was delivered to secure them against loss on account of said debt, and for purposes more fully stated in an annexed act of subrogation from the bank to them, passed in the parish of Concordia, on the 15th December, 1842. To this answer the plaintiff replied, by denying that any assignment was made as alleged. He says the laws of the State in which the bank is situated, and by which it was incorporated, forbid any such transfer or assignment as is set up; that said transfer was made without authority from the board of directors, and that no notice was given of it to Lambdin previous to the attachment; that the bank was in insolvent circumstances, and that the alleged transfer was an improper attempt to give a preference to one creditor over another, and that Brown, Brothers & Co. have never accepted it.

At the trial, it was admitted that the Agricultural Bank was

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indebted to Brown, Brothers & Co. upwards of \$446,000, with interest, and had received at Natchez a large amount in bills receivable and other assets, the nominal amount of which was much greater than the indebtedness, but that not enough had been collected to pay them, and that the bank was at the time owing them much more than the amount of Lambdin and Bisland's note; that the transfer of this note was subsequent to the transfer of the other bills receivable, and that no new consideration was given for it; that judgments to a large amount had been rendered against the bank in Mississippi, upon which executions were issued, and returned "*nulla bona*"; and that payments in specie were suspended in 1840, and never since resumed. It was further admitted, that the common law prevails in Mississippi, with statutory modifications; and it was agreed that the printed statutes of that State shall be used in the inferior and Supreme Court.

The plaintiff gave in evidence a duly certified copy of the record, judgment and execution in his favor, rendered in Mississippi, the answers of Lambdin to the interrogatories, and the notice of Tyler and Henderson, trustees, to him of the assignment of his and Bisland's note; also the first transfer of bills receivable and assets from the bank to Brown, Brothers & Co., passed before the parish judge of Concordia, in August, 1842. In behalf of Brown, Brothers & Co., the act passed on the 15th December, 1842, assigning and pledging to them the note of Lambdin and Bisland, as additional security for the debt owing to said assignees, was given in evidence. The court below, after a full statement of the facts, and consideration of them and other topics, concluded that there was "no other way to get rid of this entangled business except on the technical rule, that the plaintiff has a recognition of his judgment and an order for its execution, and his application for these is an abandonment of his attachment, and this order has not been properly annulled." For this reason principally, and incidentally because the note was transferred before it became due, and because there is nothing to impeach the validity of the assignment, such being valid in Mississippi, where it will not be interfered with in favor of non-resident creditors; and further, because

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the statute which prohibits the transfer by banks of their rights and credits, was made in favor of debtors, and the only relief they have is to plead the same in abatement when sued by a transferee, the court gave a judgment of nonsuit against the plaintiff, saying that, if the statute forbidding assignments is of any avail, it avails against the attempt of the plaintiff to acquire a right to the debt owing by Lambdin, by citing him a garnishee. From this judgment the plaintiff has appealed.

The judge of the inferior court complains very much of the management of this cause, and the confusion produced by it; but it appears to have been plain enough until he allowed the application of Lambdin to cite in Brown, Brothers & Co., and persisted in keeping them in court, in spite of their exception to his "*Brierean jurisdiction*," as he calls it. There were before the court a plaintiff, with a demand liquidated by a judgment not open for investigation; a corporation located in another State, as defendants; and a garnishee making no objection to being drawn into the cause, and answering under oath that he was a large debtor of the defendants, but stating, by way of precaution, that he had, since he was cited as garnishee, been notified of an assignment of the *note* he owed, of which he had no previous knowledge.

As between the plaintiff and defendants, the demand of the former is sufficiently established by the record and judgment of the Circuit Court of Adams county. It is conclusive between the parties, both being before the court, and a verdict and judgment having been given upon the issues made. The defendants have no right to go behind that judgment, and again put the plaintiff upon proof of his demand. The garnishee admits that he gave his note to the defendants, for a much larger sum than the plaintiff claims, and interposes no obstacle to a judgment, if it be so rendered as to protect him, in the payment of it, from future liability. Lambdin acted correctly, in stating in his answer the notification to him of the transfer of the note to Brown, Brothers & Co., and in requesting that they should be notified of the proceedings against him. He would be liable to pay a second time, if any injury should result from his withholding the information; but the court below was wrong in

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compelling Brown, Brothers & Co. to assert their claim to the note of Lambdin and Bisland in a manner they did not wish, and before a tribunal not of their selection. They had notice that a legal proceeding was pending which might seriously affect their rights and interests. If they choose to stand by, and not assert their claims, they do so at their peril; and it is not the duty of the court to force them to the assertion of them. The law authorises persons whose interests may be affected by a suit pending between other parties, to intervene in such suit, and join one of the parties, or oppose both; but it does not compel them to do it. Code of Practice, arts. 389, 390, and amendments thereto. They have a right to institute their separate suit against either, or both of the parties litigant (*Ibid*, art. 391); and if any of their rights have been lost or impaired, by their neglect, after notice of the proceedings likely to affect them, the loss is the result of their own misconduct or inattention. We are, therefore, of opinion that the court erred, in overruling the exception of Brown, Brothers & Co. Whenever they think proper to pursue Lambdin on the note alleged to have been assigned by the defendants, he may oppose to them, not only the statute of the State of Mississippi declaring it illegal for any bank to assign its assets, and abate their suit; but he can also set up his notice to them of the proceedings in this case, and their refusal or neglect to take care of their rights when they were in danger. This court has more than once decided, that a garnishee is but a stakeholder between other parties. He can do nothing more than take care of himself, and not become liable for more than he really owes, or is bound for. He cannot interfere between the plaintiff and defendant, or others setting up claims to what he has in his hands, but must pay to whomsoever the court may order him. 4 Robinson, 517. 14 La. 511. 19 La. 405. It is also well settled by numerous decisions of this court, that so long as no notice is given of the assignment of the debtor's claims against a third person, such claims are liable to be attached. In this case, it is not pretended that any notice of the assignment of Lambdin and Bisland's note was given, until after the former was cited as a garnishee. The notice is dated subsequently to the attach-

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ment, and in it Tyler and Henderson state that they are informed that an attachment had been levied, and, therefore, they give the notice. This is clearly insufficient.

The counsel for the defendants contends that an attachment cannot lie against a foreign corporation. We do not think there is any weight in the objection. Our reports contain numerous cases of the kind; and our jurisprudence on that point is too well settled to require further argument. He further says that the suit cannot be maintained, because nothing is attached; that the bank disclaims any right to the note, and has put it beyond its control; and that the plaintiff cannot reach it, as he cannot have any greater rights than the bank has. If this doctrine were admissible, it would be very easy for every debtor to defeat the claim of his creditor, by making a fraudulent assignment. But the counsel does not seem to recollect that the assignment made by the bank was not valid and complete against third persons, until notice had been given to the debtor. The note was not beyond the control of the bank in fact, because it has never gone out of the possession of Tyler, who was the president of the institution.

The judge below held that, as he had made the judgment rendered in Mississippi executory in this State, it dissolved the attachment, said order not having been legally annulled, wherefore he nonsuited the plaintiff. In this, we think, the court erred. In the first place, we think that said order could be, and was, properly annulled. If it were any thing at all, it was a judgment in favor of the plaintiff, never executed. It was his property, and he could consent to its being annulled if he thought proper. We suppose that the court below thought there were grounds for annulling it, when the order was made; and no one has ever complained of it, until the judge made it the means of escaping from the position in which he was placed. The defendants appeared by counsel long after the two orders were made, and pleaded to the merits, taking no exception to any previous proceeding in the case. This, we think, is a waiver of any previous irregularities in the case. As to the validity of the assignment, we do not consider it necessary to decide further than we have already.

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It is, therefore, ordered and decreed, that the judgment of the Commercial Court be annulled and reversed, and that the plaintiff, Rowland G. Hazard, do recover of the Agricultural Bank of Mississippi the sum of seven thousand seven hundred and ninety-one dollars and twenty-three cents, with interest at the rate of eight per centum per annum on the sum of seven thousand seven hundred and seventy-eight dollars and twenty-three cents, part thereof, from the 14th day of December, in the year 1842, with costs in both courts; and it is further ordered and decreed, that the garnishee, Samuel H. Lambdin, do pay to the plaintiff, out of the funds in his hands owing to the defendants, the aforesaid sum of seven thousand seven hundred and ninety-one dollars and twenty-three cents, with interest as above stated, and costs; and that an execution issue, as on an ordinary judgment, against said Lambdin, in case he does not pay said sum, with interest and costs; so much of the costs of this appeal as relates to Brown, Brothers & Co., to be paid by the appellant.*

* *L. Pierce*, for a re-hearing. An attachment will not lie against a foreign corporation. *McQueen v. Middleton Insurance Co.*, 11 Johns. pp. 6, 7. The articles of the Code of Practice show that such a writ will lie only against natural persons. Great reliance has been placed on the act of the legislature of Mississippi forbidding the transfer of notes by the bank; but this objection comes with bad grace from the plaintiff who endeavors, by pleading a local statute, made to prevent one creditor from obtaining an advantage over the others, to obtain the assistance of our laws in securing such an advantage for himself. Admitting that, since the decisions in that State, the law itself must be regarded as constitutional in Mississippi, are the courts of Louisiana bound to carry it into effect? Are we to maintain all the prohibitory laws of Mississippi, and to treat as a nullity an act of pledge executed here, because forbidden there? The Browns are not prohibited from obtaining security in Louisiana for a just debt, because forbidden by Mississippi to do so within her limits.

But the contract between the bank and Brown, Brothers & Co., was not a violation of the laws of Mississippi. It was not such a transfer as is forbidden by the law of that State, but simply a pledge. Hazard should have brought a direct action against Brown, Brothers & Co. to annul the pledge as illegal. Where title in third persons is sought to be divested, recourse must be had to a direct action of revocation. 17 La. 559. 1 Rob. 437. *Holmes v. Remsen*, 20 Johns. 229.

The court have decided that Brown, Brothers & Co. could not be compelled to engage in this controversy; yet it has ordered Lambdin to pay to the plaintiff, to

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SALLY MILLER v. LOUIS BELMONTI.

Persons of color are presumed to be free. *Per Curiam*: Slavery is an exception to the condition of the great mass of mankind, and, except as to Africans in the slave-holding States, the presumption is in favor of freedom, and the burden proof is on him who claims the colored person as a slave.

APPEAL from the District Court of the First District, *Buchanan, J.*

BULLARD, J. The plaintiff sues for her freedom, on the ground that she was born free, and of European parentage. She asserts that her father was Daniel Miller, and her mother Dorothea Miller; that they emigrated from Germany in 1817 or 1818, with herself, and two other children; that her mother died upon the passage, and her father soon after their arrival. She sets forth in her petition many things connected with her biography, and that of her father, which are unsupported by evidence, and which we regard as wholly immaterial to the great question which the pleadings present, to wit, whether the plaintiff be white and free, or a slave—*libera, vel non*.

The original defendant, Belmonti, asserts that she is his slave, purchased by him from John Fitz Miller, whom he calls in as warrantor.

the prejudice of their rights. If Brown, Brothers & Co. were not compelled by law to appear and defend themselves, the whole proceedings in this attachment were, as to them, *res inter alios*, and they cannot be concluded thereby. The record shows that Lambdin and Bisland's note was an ordinary negotiable note, not yet due when "assigned, transferred, pledged and delivered" by the bank to Brown, Brothers & Co. If this act was an absolute transfer, the note, being within the custom of merchants, was transferrable without delivery or notice. But it was really and plainly a pledge; and by article 3128 of the Civil Code, notice was unnecessary. The pledge has been declared void on the assumption that the note never passed out of the hands of the president of the Agricultural Bank. The record shows that the contrary was the fact. By the act itself the note is expressly stated to have been transferred and delivered. The fact that Tyler appears to have been subsequently, with one Henderson, the agent of Brown, Brothers & Co., and that the note was then in their possession, is not inconsistent with the declarations of the notarial act as to the delivery of the note. The fact that Tyler *had been*, at a former period, president of the bank, did not incapacitate him from becoming the agent of Brown, Brothers & Co.

Re-hearing refused.

The warrantor pleads that, in August, 1822, one Anthony Williams, then of Mobile, left with him a certain mulatto girl, then named Bridget, and about twelve years old, whom he claimed as his slave, and represented to be a mulattress and slave for life. That having made an advance of one hundred dollars, to be reimbursed on the sale of said girl, he afterwards sold her to his mother, Mrs. Canby, by whom she was raised as a domestic, and who retained her until 1834, when she, with her children, were sold back to him; and afterwards, in 1838, were by him sold to Belmonti, the defendant. He avers that the same Bridget is now plaintiff in this case, suing by the name of Sally Miller; that he never knew of her until she was left with him for sale, in 1822; that he believed, and still does believe her to be a mulattress, of African descent, and a slave for life. That he is entirely ignorant of all the allegations in the petition. He sets forth other matters touching his liability as warrantor, which it is not necessary to repeat.

The District Court, not being satisfied that the plaintiff had shown herself entitled to her freedom, dismissed her petition, and she appealed.

The first enquiry which engages our attention is, what is the color of the plaintiff? In questions of this kind much weight is given to that consideration. Ever since the case of *Adelle v. Beauregard*, in the Superior Court, as early as 1810, it has been the settled doctrine here, that persons of color are presumed to be free. Slavery itself is an exception to the condition of the great mass of mankind, and, except as to Africans in the slave-holding States, the presumption is in favor of freedom, and the burden of proof is upon him who claims the colored person as a slave. In that case, the court remarked: "Persons of color may have descended from Indians on both sides, from a white parent, or mulatto parent, in possession of their freedom. Considering how much probability there is in favor of the liberty of these persons, they ought not to be deprived of it upon mere presumptions, more especially as the right of holding them in slavery, if it exists, is, in most instances, capable of being satisfactorily proved." 1 Mart. 183.

The same principle was recognised in the cases of *The State v. Cecil* (2 Mart. 208), and *Pilić v. Lallande et al.* (7 Ib. N. S. 649).

Nor is it peculiar to our jurisprudence. In the highest court of the State of Virginia, it is a well settled rule of law; and a person of the complexion of the plaintiff, without evidence of descent from a slave mother, would be released even on a *habeas corpus*. 1 Henning and Munford, 134.

The proof in the record of the complexion of the plaintiff is very strong. Not only is there no evidence of her having descended from a slave mother, or even a mother of the African race; but no witness has ventured a positive opinion, from inspection, that she is of that race. She is evidently a *trunette*, but Gen. Lewis, one of the most intelligent and candid witnesses on the part of the defendant, who had known her long, says she is as white as most persons; but that he has seen slaves as bright as the plaintiff. He adds, that he always thought she had something resembling the colored race in her features, but this opinion may have been induced by the fact, that he had always seen her associating with persons of color. He also testifies to her resemblance to another female then in open court, shown to be a German, and a kinswoman of the lost daughter of Daniel Miller.

Being satisfied that the presumption is clearly in favor of the plaintiff, it is next proper to enquire, how far that presumption has been weakened, or fortified, or repelled by the testimony, of numerous witnesses, in the record.

If a number of witnesses had sworn, that the plaintiff is, in their opinion, the daughter of a particular colored person, who was in fact a slave, or reputed such, and an equal number of witnesses had testified to their belief, that she is identical with a child who arrived here, with her family from Germany, more than a quarter of a century ago, so far as her age and other particulars could be ascertained after that lapse of time, and judging from color and family resemblance, we might hesitate in coming to a conclusion as to who the plaintiff is—whether she be, in fact, the child so long lost sight of, or a slave. But such is not the case here. Those who maintain the hypothesis of her slavery throw no light upon her origin, or her birth. She is first known in the condition of a slave, at the age of nine or ten years, separated from her mother, left for sale by a stranger by the name of Williams, who has not since been heard of, and first

sale as such, for ought that appears in the record, by the defendant's warrantor, acting as the agent of Williams. Her own statements on the subject, so far as they are of any value, while they show that she did not seek this controversy, and was apparently contented with her condition, make no allusion to her parentage, unless it be to the Indian race; and when she alluded to the fact of having come over the lake, or of being sold by a negro trader, it is impossible to say whether she alludes faintly, as a dim reminiscence, to her voyage over the Atlantic, or to her being brought here from Mobile. On the contrary, those who maintain the proposition that the plaintiff is the person she assumes to be, and is free, have something more positive and certain. It is shown, beyond all controversy, that a child, bearing that name, and about the same age, arrived here from Germany, in 1818, with her father, a brother and a sister; that her mother died at sea—her father and brother not long after their arrival; and that the two daughters disappeared; that after a lapse of more than twenty years, the plaintiff was discovered by a woman by the name of Carl, who died before the trial, and was recognised by her relatives as the same lost child. Numerous witnesses swore positively to their undoubting conviction of her identity. But the proof does not stop at mere family resemblances and recognitions. It is shown by evidence which is not impeached, that the lost child had certain natural marks, or moles, on the inside of her thighs. The plaintiff was examined by eminent members of the medical profession, who certify to the existence of precisely such congenital marks upon her person, and that it is impossible they could be produced by any known means.

But the principle which the court adopted in the case of *Adelle v. Beauregard*, is combatted in the briefs of the counsel for the appellees, who contend that it is inapplicable to such a case as this; and they urge upon us the doctrine of the Spanish law as found in the 3d Partida, 14th title, 5th law, which declares, that "when the plaintiff in a case alleges, that he is free, and brings a suit for his freedom against his master, who holds him in his power and claims him as his slave, and the master produces any title, document, or other proof, to show that he had

possession of the plaintiff, in good faith, and not by force or fraud, it will be incumbent on the plaintiff to prove that he is free, or that the master has taken possession of him by force or fraud; for if he can prove neither, he ought to remain a slave in the power of his master, as the latter had shown a just title to the possession of him."

Such a principle may have been thought reasonable in Spain, where it is believed slavery was not confined to the negro race, and where, consequently, the distinction of color was of less importance than with us; but even there, it is not so clear, that the fair and florid complexion of the natives of the north of Spain, would not weigh as a presumption in favor of liberty, in the absence of all proof of birth from a slave mother, and especially when the title of the master originated, as has been shown in this case. Williams authorises the sale of a child apparently white, at a time when the law forbade the sale even of a slave child, separately from her mother, under the age of ten years, and thus imposed upon Miller, who, it is to be presumed, acted in good faith, and in relation to whom, we are bound to say, that the allegations in the petition tending to his prejudice, are wholly unsupported; and if we could adopt the views of the counsel, and were convinced that the proof of all those allegations was essential to the recovery of the plaintiff, we should pronounce against her. But, we repeat, that, in our opinion, they are wholly immaterial, and that the only question is, whether the plaintiff was born free. Upon that point, even if the presumption were against her, she has gone far to prove that she is the identical child of Daniel Miller. It has been said that the German witnesses are imaginative and enthusiastic, and that their confidence ought to be distrusted. That kind of enthusiasm is, at least, of a quiet sort, evidently the result of profound conviction, and certainly free from any taint of worldly interest, and is by no means incompatible with the most perfect conscientiousness. If they are mistaken as to the identity of the plaintiff; if there be in truth two persons about the same age, bearing a strong resemblance to the family of Miller, and having the same identical marks from their birth, and the plaintiff is not the real lost child, who arrived here with hundreds of

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others in 1818, it is certainly one of the most extraordinary things in history. If she be not, then nobody has told who she is.

After the most mature consideration of the case, we are of opinion that the plaintiff is free, and it is our duty to declare her to be so.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed; and ours is, that the plaintiff be released from the bonds of slavery, that the defendant pay the costs of the appeal, and that the case be remanded for further proceedings, as between the defendant and his warrantor.*

F. H. and W. S. Upton, and Roselius, for the appellant.

Micou, Canon, and Grymes, for the defendant and warrantor.

* *Micou and Canon*, for a re-hearing. The opinion of the court in this case has extended the force of a mere presumption far beyond the limit of any prior decision. The general rule of law is that the plaintiff must prove his case. The 3d Partida, tit. 14, law 5, creates an exception.

In suits for freedom, the mere possession and claim of the master, was not considered presumptive proof, throwing the *onus probandi* on the plaintiff; but if "the master produce any title, document or other proof, to show that he had possession in good faith, and not by force or fraud, *it will then be incumbent on the plaintiff to prove that he is free,*" &c. 1 Moreau and Carleton's Translation, p. 177.

In the case of *Adelle v. Beauregard*, 1 Martin 183, the court was called upon to decide, upon which party the *onus* lay. The plaintiff relied upon the law of the Partida, already quoted, and the court decided that as she was a woman of color and not a negro, she was entitled to the benefit of the law, and required the defendant to show his title.

In the case of *Mary v. Morris*, 7 La. 139, the court said: "The plaintiff being, from color and possession of defendant, presumed to be a slave, the burthen of proving her freedom, devolved on her."

The principal recognised in these two decisions, restricts, instead of extending, the rule laid down in the Partidas. That rule is in terms applicable to all suits for freedom. The evident inclination of the court is, to restrict it to suits for freedom in which the plaintiff is a colored person, and not a negro; apparently considering the presumption arising from the fact of being a negro, coupled with the possession of the defendant, sufficient to put the plaintiff upon his proof.

Nor do the cases of *Pilié v. Lalande*, 7 Martin N. S. 649, and *Hawkins v. Vanwickle*, 6 Ib. N. S. 420, conflict with the principle thus established. In one of these cases, the question arose collaterally; a witness being presented, objection was made that she was a slave. The court decided that, being in the enjoyment

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of freedom, she was, *prima facie*, to be considered free; and this court, on appeal, held the opinion correct, the bill of exceptions not showing that the witness was a negro.

In the other case, the suit being for property claimed by the plaintiff, the defendant pleaded that plaintiff was a slave. The court held that the suit not being one for freedom, but brought by a person in the enjoyment of it, the burthen of proving slavery, was on the party who alleged it.

Before the repeal of the Spanish law, in suits for freedom, the plaintiff, if a colored person, was not put upon his proof, until the defendant had shown good faith.

With this requisition the defendants in this suit have fully complied. They show a possession of twenty three years standing, under written titles, and the strongest presumptive evidence, from the position in society and circumstances of the parties, that they were in good faith. They have therefore fully complied with the law of the third Partida, and with the opinions of the court based upon that law, and have fairly placed the burden of procuring freedom upon the plaintiff.

But the Spanish law has been repealed. The special exception to the rule that the plaintiff must prove, has ceased to exist. The law declares in general terms, and without exception, that the plaintiff must produce his witnesses and evidence in support of his demand, and that the defendant is not called upon until the plaintiff has closed his case. Code of Practice, arts. 476, 477.

This court has since applied this principle to a suit for freedom.

The opinion was pronounced by the present senior judge, who commences by stating that, "the plaintiff is a person of color, and sues her aunt for the purpose of establishing her, and her childrens' claim to freedom." The intervenors were also persons of color, and the plaintiff, though held by them as a slave, claimed to be their relation. The court below having instructed the jury that the intervenors were not bound to show their title, this court said: "On a full consideration of the case, this court is of opinion, that the instruction was correct. A slave cannot stand in judgment for any other purpose than to assert his freedom. He is not even allowed to contest the title of the person holding, or claiming him as a slave." *Berard v. Berard*, 9 La. 158.

Whether we consider the law of the Partida in force or not, the *onus* lies upon the plaintiff in this case. If the rule of the Partida is no longer law, then the plaintiff as such must make out her case.

If the rule remain in force, the defendant has shown good faith by adducing his title, proving the payment of a fair price, and calling his vendor in warranty; thus throwing back upon the plaintiff the burden of proof.

If the court should be of opinion that the warrantor was also obliged to show his title before demanding any proofs from the plaintiff, he has done so, by producing a title, which, beyond doubt, he received in good faith. See also the case of *Seville v. Chrétien*, 5 Martin, 275.

Re-hearing refused.

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JOHN WILCOX v. HIS CREDITORS.

A plea of compensation is in the nature of a demand, and should be accompanied with a specification of the particular amount expected to be compensated, of the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands.

A syndic of the creditors of an insolvent, though himself an attorney and counsellor at law, may procure the assistance of counsel in cases in which he needs it. He is a judge of the necessity; and where the value of the services is proved, and it is not shown that such assistance was improperly sought, the fees of the counsel must be paid out of the estate surrendered.

Prescription is interrupted by a *cessio bonorum* made by the debtor.

One who has loaned money to an insolvent, before his surrender, for the purpose of satisfying a judgment obtained against him, should prove the loan and subrogation and the receipt of the money by the judgment creditor, by a notarial act. C. C. 2156 § 2. But where the loan and subrogation were proved by authentic act, and parol evidence was admitted in the lower court, without objection, to establish the payment to the creditor, it will be too late to object to the nature of the proof of payment, after appeal.

APPEAL from the District Court of the First District, *Buchanan, J.*

G. B. Duncan and *Barker*, for the appellants,

Hennen, syndic, *pro se.*

Emerson, for the appellee, *Thompson.*

McHenry, appellee, *pro se.*

MARTIN, J. Chester Clark, Thomas Hunt and Wells Phillips, trustees of the New York creditors, and Josiah Barker, are appellants in this case.

Barker complains that the court erred in disallowing his claim for \$88, paid by him on a note filed, and in rejecting proof of compensation of the claim of the New York creditors; and that, in the event of this claim being disallowed, the court erred in rejecting the balance of \$88 52, due him for commissions. He complains of an allowance of \$1,500 to McHenry, for counsel fees, because the parties interested were present; the syndic did not require the aid of counsel; and McHenry was counsel for some of the parties in the case; for the further reasons, that the property mortgaged before the failure ought

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not to be exhausted for this purpose ; and because the allowance is extravagant, and ought to be reduced.

The trustees of the New York creditors claim the rejection of every allowance to Barker, McHenry, and Hester Matilda Thompson. The claim of McHenry was opposed on the same ground as that taken by Barker. Those of Barker and Thompson, as being unsupported by evidence, and barred by prescription.

Barker's counsel has called out attention to a bill of exceptions, which he took to the opinion of the court, on the rejection of the evidence offered to support the plea of compensation. It does not appear to us that the court erred. This was an effort to reject the claim of the New York creditors, on the ground that it was extinguished by compensation. The District Court thought the plea too vague and indistinct ; that the creditors ought to have been informed of the nature of the compensation intended to be proven, in order to prepare themselves with evidence to disprove it. The plea of compensation is in the nature of a demand, and ought to be accompanied with a specification of the particular amount expected to be compensated, the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands.

The claim of McHenry is opposed on the ground that the syndic is a practising attorney of the court in which the proceedings on the failure are instituted ; that he did not need the advice or assistance of counsel ; that the sum allowed is extravagant ; and that McHenry was employed by some of the parties in the case, who had an interest adverse to those whom the syndic was bound to protect. We are of opinion that a syndic, although he be an attorney, may procure the assistance of counsel in cases in which he needs it ; that he is a judge of the necessity ; and that, in the present case, there is no evidence that the aid of McHenry was not properly sought. The proposition that he was of counsel for a party, or parties, who had an interest adverse to that which the syndic was bound to protect, is not established by proof. It is, indeed, shown that he was appointed curator of some minors having such an interest ; but

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the appointment did not take place until the termination of the suits in which he was employed by the syndic. Respectable members of the bar attest that the charge is not an incorrect one.

We have not been enabled by this appellant to discover in the evidence anything in support of his two small claims for commissions and disbursements.

What we have said on the opposition of Barker to the claim of McHenry, renders it unnecessary to speak of it on the opposition of the New York creditors.

Their opposition to Barker's claim is unsupported, and the plea of prescription thereto cannot avail, as the insolvent made a surrender of his property within a year or two after any part of it was demandable.

Hester Matilda Thompson's claim is on a subrogation of a judgment obtained by Bundy against Wilcox, as a lender of the amount of that judgment to Wilcox for the payment thereof.* The loan is established by a notarial act. So ought to have been the receipts by Bundy. If this had been done, the subrogation would have been perfect. The payment to the creditor is proven by parol. Civil Code, art. 2156 § 2. These appellants might have opposed the introduction of parol evidence to show that the amount of the judgment had been received by Bundy, the creditor, and they cannot complain in this court that it was received. The plea of prescription cannot avail, for the reasons given in the case of Barker.

Judgment affirmed.

* The loan and act of subrogation were made on the 1st of January, 1837. Wilcox made his surrender in 1839.

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MURRAY MENZIES THOMSON, Executor of the last will of George B. Milligan, deceased, v. WILLIAM CRAIG MYLNE.

By an act *sous seing privé*, signed by both parties, registered, on proof by a witness of the signatures of the parties, in a notary's office, and subsequently recorded in the office of the parish judge of the parish in which the land was situated, D. & Co. agreed to sell to the plaintiff one third of a plantation, with the slaves, etc. thereon, for a certain sum, payable in seven yearly instalments, the latter binding himself, should any amount remain unpaid at the end of the seven years, to give a special mortgage on the property for such balance, with interest from that time. The contract stipulated, that the plaintiff should reside on the plantation, and manage it for a fixed salary; that the supplies should be furnished by D. & Co., and the crops sold by them, and that the proceeds of the sales, after deducting expenses, should be considered the annual product of the plantation, one third of which should be placed to the credit of the plaintiff; that the contract should continue for seven years, renewable if agreeable to all parties, but if a dissolution should take place, the value of the property to be fixed for settlement by mutual appraisement, or by public sale; that plaintiff should pay one third of what may be expended on certain proposed improvements, with interest, from the date of the advance by D. & Co. of the necessary sum, until plaintiff's share be paid; and that "the agreement should be regularly completed before a notary as soon as possible." *Held*, that the act was not merely a promise to sell, but an absolute sale, which vested the ownership of one third of the plantation, slaves, etc., in the plaintiff, from its date, the vendors becoming his creditors for the price; that the term of seven years was stipulated only in reference to the duration of the partnership; and that the declaration that the agreement should be completed as soon as possible before a notary, was not an essential condition of the contract, but a mere provision for securing regular evidence of the convention.

A sale is complete between the parties as soon as there exists an agreement for the object and the price, though the object be not yet delivered, nor the price paid. C. C. 2414, 2431. And such a sale has effect against third persons from the date of its registry in the office of a notary, and the actual delivery of the thing sold. C. C. 2242, 2417.

A promise to sell amounts to a sale where there exists a reciprocal consent of both parties, as to the thing and the price. C. C. 2437.

Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgment of the mortgagor's title to the whole of the property.

A District Court has jurisdiction of an action by the executor of a deceased partner against the survivor, for a settlement of the partnership accounts.

A balance due by the succession of one of the members of a particular partnership to his copartner, for the price of his share in a plantation cultivated by them in partnership, is not a partnership debt to be satisfied out of the partnership property. The survivor is not a creditor of the partnership, but of his deceased partner.

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The jurisdiction of District Courts extends to the liquidation of claims against successions when pleaded in compensation or reconvention, so far as the conflicting claims extinguish each other; but for any balance ascertained to be due to the defendant he must resort to the court in which the succession was opened, that his rank may be ascertained contradictorily with the other creditors, and his claim placed in its proper place on the *tableau* of distribution.

APPEAL from the District Court of the First District, *Buchanan, J.*

This case grew out of the following agreement, and presented the question whether the instrument itself amounted to an absolute sale, vesting a title to one third of the property in Milligan, from its date. A full statement of the pleadings and evidence will be found in the opinion of the court, *infra*.

"Agreement betwixt Messrs. Dennistoun & Co. on the one part, and G. B. Milligan on the other.

1st. Dennistoun & Co. agree to sell to G. B. Milligan one third of the sugar plantation they own, situated near the English Turn on the other side of the river, with all the slaves, buildings, utensils, &c., thereon, or appertaining thereto, for fifty-two thousand dollars, payable in one, two, three, four, five, six and seven years, in equal instalments, without any interest until the end of the contract; and on whatever sum may be then unpaid, G. B. Milligan to pay six per cent interest per annum, with special mortgage of the property until the whole is paid.

2d. It is understood that ten slaves and six manumitted negroes, owned by G. B. Milligan, are to remain on the estate to assist in its cultivation, and be fed and clothed as the other negroes on the plantation, at the general expense.

3d. It is understood that G. B. Milligan will reside upon the plantation and devote his attention wholly and exclusively to its cultivation and improvement; that he shall receive from the concern an annual salary of one thousand dollars, and have the privilege of what the plantation may yield, for his own use; but his expenses otherwise to be borne by himself.

4th. The supplies requisite for the plantation to be furnished by Dennistoun & Co., and a commission thereon of $2\frac{1}{2}$ per cent, as well as on all sums they may lay out, to be charged; the crop of sugar to be sold by them charging a commission of $2\frac{1}{2}$ per cent, as well as on the proceeds of any wood, stock, or other pro-

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duce that may be sold ; an annual statement to be made out ; and the proceeds of the sales, after deducting the current expenses, to be considered the annual product of the plantation, one third of which to be placed to the credit of G. B. Milligan, and the remaining two thirds to the credit of Dennistoun & Co.

5th. That this contract shall exist for seven years ; at the end of which period, if agreeable to all parties, be renewed ; but if a dissolution should take place, the value of the property to be fixed for settlement by mutual appraisement, or by public sale.

6th. In case the proposed sugar house and other buildings are erected, and additional negroes purchased, G. B. Milligan to pay one third of whatever sums may be laid out, bearing interest at six per cent per annum from the date of the money being advanced by Dennistoun & Co., until his share is paid.

7th. This agreement will be regularly completed by a notary public as soon as possible. Signed in duplicate. New Orleans, this sixteenth day of March, 1828.

(Signed)

DENNISTOUN & Co.
G. B. MILLIGAN."

Eustis, for the plaintiff.

D. Seghers, for the intervenors. The agreement was not a mere promise to sell ; it was an actual sale to Milligan of one third of the plantation. Civil Code, art. 2414. The sale was perfect as soon as the agreement was signed. *Ib.* 2431. There was no occasion to complete it before a notary. Troplong, *Vente*, vol. 1, pp. 191, 193, no. 119. It had full effect against third persons from its registry in the notary's office, and in the office of the parish judge. Civil Code, arts. 2417, 2242. Acts of 1810, ch. 25, p. 60, s. 7. Delivery is proved by the agreement itself. Milligan, who had resided on the plantation before the sale, continued to do so after. Previously to the sale he possessed for his employers ; afterwards he possessed two thirds for Dennistoun & Co., and the remaining third for himself, *animo domini*.

The promise to sell amounts to a sale in this case. Civil Code, arts. 2414, 2415, 2437. Troplong, *Contrat de Vente*, vol. 1, pp. 193, 194. Troplong, p. 160, quotes Portalis who says : "*La promesse de vente vaut vente lorsqu'il y aura consentement réciproque des deux parties sur la chose et sur le prix. On trouve effective-*

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ment, en pareil cas, tout ce qui est de la substance du contrat de vente. Next he quotes Cochin, who says: "Il est de principe qu'on n'est pas moins lié par une acte que l'on rédige et que l'on signe soi-même, que par ceux qui se font en présence des notaires. Si, par l'acte même, on s'oblige à en passer un autre pardevant notaires, l'acte pour cela n'est pas un simple projet, c'est seulement une forme plus authentique que l'on promet d'y ajouter, mais dont on peut se passer.

Il a été mille fois jugé qu'une promesse de passer contrat de vente était obligatoire, quoiqu'il n'y eut aucun contrat passé en conséquence, et qu'il suffisait pour cela que la promesse contint les conditions essentielles de la vente, *substantialia contractus*.

Cochin ajoute: 'Ce n'est pas une simple promesse de passer contrat, c'est un acte parfait par lui-même, qui contient une obligation présente, absolue, sans retour, et à laquelle on a seulement ajouté la promesse de le cimenter par un acte devant notaires, si la Dame de Mézières (l'acquéreur) le réclamait."

Merlin, after stating the doctrines which prevailed on this subject in France previous to the Code Napoleon, and the questions which arose thereunder, adds: "Le Code Civil a rendu cette question sans objet en adoptant l'opinion des docteurs qui assimilaient la promesse de vendre à une vente effective. La promesse de vendre vaut vente, lorsqu'il y a consentement réciproque des deux parties sur la chose et le prix." C. N. art. 1589, (La. Code, art. 3437.) Merlin, Répertoire, *verbo* Vente, § 7, tome 36, p. 84. Edition de Bruxelles.

The defendant and his partners have recognised the ownership of the one third by Milligan, by allowing him in their accounts one third of the revenue of the plantation, and by stipulating that they should have their commissions on the sale of the crops, &c.; which would have been a useless stipulation, had the plantation, and consequently the crop, been exclusively their own.

Any claim of the defendant, or his vendors, against the succession of Milligan, must be settled before the court in which his succession was opened, contradictorily with the other creditors. Milligan's alleged tacit assent to the mortgages given by

Mylne to the Union Bank, might have estopped him from denying the title of the Union Bank, when opposed by the Bank ; but it could not conclude him when opposed by Mylne.

Briggs and Grymes, for the appellant. The letter written by Milligan to A. Dennistoun, at the time of Hill's death, (at p. 359 *post*) shows the nature of the arrangement, contemplated by the parties to the agreement, subsequently entered into. If this agreement were an actual sale, the provision of the fifth clause were useless, for Milligan, being a proprietor, as well as Dennistoun, was entitled to enforce a judicial partition. If it was intended that Milligan should become a proprietor from the date of the agreement, why did his vendor provide for a mortgage to be taken at the end of the seven years? The instrument was a mere agreement to form a partnership, the whole capital of which was furnished by defendant's vendor. A partner may be a creditor of the partnership. Civil Code, art. 2835 ; and by art. 2794, the partnership assets are liable to partnership creditors in preference to others. *Purdy v. Hood*, 5 Martin, N. S. 130. See Gow on Partnership, and Story on the same subject, p. 135. The cases of *Nathan v. Gardere* (11 La. 264), and *Bernard, Syndic v. Dufour* (17 La. 598), are not inconsistent with the position here contended for. In construing the expression, *promesse de vente vaut vente*, no commentator, nor any decision, has ever gone the length of decreeing title, without a performance of the conditions subscribed to. Had Milligan died within a few months after the execution of the agreement of the 16th of March, 1828, and, unknown to Dennistoun & Co., largely indebted, would the court have decreed the property to belong to his creditors, when not a dollar had been advanced by the deceased? In this case, as in that of *Millaudon v. Sylvestre*, 8 La. 262, the parties contemplated the formation of a partnership. Milligan was entitled, should he subsequently elect so to do, to become interested in the capital on certain conditions ; and the words of conveyance, or of promise to convey, must be controlled by the spirit and evident meaning of the instrument.

SIMON, J. The object of this action, which is instituted by the testamentary executor of the late George B. Milligan, is threefold : He seeks, first, to obtain the partition, in kind or otherwise,

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of a sugar plantation, slaves, &c. which, he alleges, belong for one third to the succession of the deceased, the other two thirds belonging to the defendant. 2d. To compel said defendant to account for the crops of sugar and molasses made on the said plantation since the decease of the testator, and also for the nett proceeds of the crop on hand at the time of said decease, received by defendant, and never accounted for. 3d. To obtain a settlement and liquidation of the partnership concerns, and of all the transactions growing out of the same, and a judgment against the defendant for the portion thereof due to the succession, &c.

The defendant, after pleading the general issue, admitted the existence of the agreement alluded to, and set up in the plaintiff's petition as the basis and origin of his title, as executor, to the one third by him claimed, bearing date the 16th of March, 1828, but denied that the deceased derived any right under, or by virtue of the same, except that of calling for its completion by an act of sale, on the terms, and on the fulfilment of the conditions therein contained. He further averred that those conditions have never been complied with by the testator; that the latter acquiesced in the sale of the premises to the respondent; and that it was well understood that his said rights should be perfected on the fulfillment of his part of the said agreement. That said deceased is indebted to him, defendant, as vendee of Alexander Dennistoun, assignee of Dennistoun & Co., on this account, in the sum of \$37,650 29, with interest; that he never disputed the testator's right to call for title to his portion of the plantation, &c, on the payment of the balance due on the price, but, on the contrary, is ready, on such payment, to make the necessary conveyance. He, therefore, prays for judgment against the succession for the balance due; for a partition of the property, by a sale thereof, &c.; and for satisfaction of his claim out of the proceeds of such sales, &c.

The widow and heirs of David Urquhart, deceased, stating themselves to be creditors to a large amount of Milligan's succession, intervened in the action for the protection of their rights, alleging that the plaintiff, who sues as executor, has, in his own personal name, an adverse interest in the issue of the cause, he

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being a partner of the defendant. They assert: 1st. That the agreement of the 16th of March, 1828, was a perfect and complete sale, binding on the vendors and on the defendant, who acquired subsequently, having been duly recorded in the office of the judge of the parish of Plaquemines, on the 24th of June, 1830. 2d. That the deceased has been in the open and undisturbed possession, as owner, of his undivided third of the property, ever since the date of the contract; that he always complied with the conditions of the agreement, resided on the place, and devoted his attention to its cultivation and improvement; and that the sixteen hands, referred to in the second article of the contract, were constantly kept on the plantation, and still remain there, to assist in its cultivation, &c. 3d. and 4th. That the matters in controversy relative to any claim set up by the defendant, or his vendor, against the estate of the deceased, as also to the settlement of the balance alleged to be due by the deceased on the price of the sale, are within the exclusive jurisdiction of the Court of Probates of the parish of Plaquemines, which court alone has the right to settle and liquidate such claims, to enquire into their validity, and to order their classification on the *tableau* of distribution of the assets of the estate according to their rank. 5th. That the defendant, for his own benefit, has incumbered the property with three several mortgages in favor of the Union Bank of Louisiana, amounting together to \$81,420, with interest; and is bound to clear, at his own expense, the succession's third part of the said property from the incumbrances by which it may be affected. The intervenors further say, that they join in the averments of the plaintiff's petition, and pray that a partition of the whole property may be made by a sale thereof, &c.; that by the same judgment the defendant be ordered to account to the succession for its interest in the crops; and that the defendant's claims set up against said succession be dismissed for want of jurisdiction, reserving to the defendant the right of having his said claims settled and liquidated by the Court of Probates, contradictorily with the other creditors of the deceased, &c.

This intervention was answered by the defendant, pretty much on the same grounds as those set forth in his original answer, but further alleging that the agreement referred to was intend-

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ed for the contracting of a partnership between the parties thereto; that said partnership was dissolved by the death of the deceased; that the mortgages with which the estate is incumbered, were given with the knowledge and consent of Milligan; and that, by the terms of the agreement, the deceased had a right, at the expiration of seven years, to call for specific performance on securing, by mortgage of the partnership premises, any amount which might be still due, or to dissolve the partnership itself. He admits his liability to account for the profits up to the period of the testator's death, but denies his being bound for profits subsequently accrued; and, finally, avers that he is still willing to make title to the succession, on being paid the amount which, at the time the partnership was dissolved, was to be contributed by the deceased.

Under these pleadings, the case was tried contradictorily with the intervenors, and the judge *a quo* being of opinion that one third of the premises in partnership belonged to Milligan's succession, but that the defendant must be referred to the Probate Court of Plaquemines for a settlement of his claims against said succession, declaring, however, in the mean time, that they constitute no lien upon the property, ordered a division thereof to be made between the parties, in proportion to their respective interests, the mode of partition to be subject of an ulterior decree; and from this judgment the defendant has appealed.

The intervenors have prayed in their answer to this appeal, that the judgment appealed from may be so amended as to allow to the succession of the deceased, its proportion of the crop existing at the time of the death of the testator, as per inventory made at the time of its opening; as also its proportion of all the subsequent crops raised on the plantation since the decease of Milligan until the present time.

The facts exhibited by the record, are mainly these: In a letter addressed by the deceased to Alexander Dennistoun, bearing date 27th December, 1826, after the death of one Hill, the former partner of the firm of Dennistoun, Hill & Co., the deceased communicates his ideas upon the nature and extent of an arrangement which had been contemplated by the parties, but which had never been executed; and he expresses his readiness

to acquiesce in whatever views the change of circumstances resulting from Hill's death may have induced in the mind of Dennistoun. He says he was to be interested one third in the purchase of the plantation at what it cost, allowing five per cent interest, &c., and expresses his views upon the interest he was to have in acquiring a proportion of the property, &c. See letter, p. 359 *post*.

Nothing was done, however, on these propositions until the 16th of March, 1828, when an act under private signature was executed by Dennistoun & Co. on the one part, and G. B. Milligan on the other, in which it was stipulated: 1st. *That Dennistoun & Co. agree to sell to Milligan, one third of the sugar plantation they own &c, with all the slaves, &c. for fifty two thousand dollars, payable in one, two, three, four, five, six and seven years, in equal instalments, without any interest until the end of the contract; and on whatever sum may be then unpaid, Milligan to pay six per cent interest per annum, with special mortgage on the property, until the whole is paid.* 2d. *Ten slaves and six manumitted negroes, owned by Milligan, to remain on the estate to assist, &c.* 3d. *Milligan to reside on the place, and to manage it for a salary of \$1,000 a year.* 4th. *The supplies to be furnished by Dennistoun & Co. &c; the crops of sugar to be sold by them, and the proceeds of the sales, after deducting the expenses, to be considered the annual product of the plantation, one third of which to be placed to the credit of Milligan, &c.* 5th *The contract to exist for seven years, at the end of which period, if agreeable to all parties, to be renewed; but if a dissolution should take place, the value of the property to be fixed for settlement, by mutual appraisement, or by public sale.* 6th. *Milligan to pay one third of whatever sums may be laid out, in case the proposed sugar house and other buildings are erected and additional negroes purchased, said third to bear interest at six per cent per annum, from the date of the money being advanced by Dennistoun & Co., until his share is paid.* And 7th. *This agreement will be regularly completed before a notary public as soon as possible.* This act was regularly registered in a notary public's office in New Orleans, on the 30th of October, 1828, under the declaration on oath of a witness proving the signatures of the parties; and was also recorded in the office of the judge of the parish of Plaquemines, on the 24th of June, 1830.

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The partnership went on according to the contract, and continued even after the expiration of the seven years; but, during its existence or operation, the defendant, and M. M. Thomson, being the attorneys in fact of their partners, passed and executed a notorial act, on the 24th of May, 1836, in which they gave to each other a mutual power of attorney and a mutual substitution to the powers of their constituents, by virtue of which the defendant, on the 30th of August, 1836, sold to himself, by authentic act, the plantation, slaves, &c., for the sum of \$120,000.

In February and April, 1837, and in January, 1839, the defendant executed three acts of mortgage on the whole premises, in favor of the Union Bank of Louisiana, to secure large amounts loaned to him by the bank, the last of which mortgages was accepted by Milligan, as president of said bank, and who was an officer of the Union Bank, either as president or director, through the whole period embraced by the three mortgages.

Milligan died in March, 1841, and an inventory of his estate having been made in April following, his third interest in the premises was put thereon as a part of his succession, as also his proportion of the preceding crop of sugar and molasses. The same had also been put on the inventory made after the death of his wife, in 1832.

It is further admitted in the record, that Milligan resided on the premises since the 16th of March, 1828, till the time of his death. That during this period, he superintended the cultivation and improvement of the plantation. That the sixteen hands mentioned in the second article of the agreement, or the survivors, have been constantly kept there since its date, and still continue there, for assisting in grinding the crop. That the deceased resided on the said plantation long anterior to March, 1828, acting as manager for the defendant's vendors. That Milligan's succession is insolvent. That both parties claim under the same title, and that the claim of the contracting party with Milligan is not contested, nor that of the defendant to the remaining two thirds; and that the defendant received the crop mentioned in the inventory, and those made on the plantation since.

The record contains also two accounts current, produced in

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evidence by the defendant, the first of which, beginning 16th March, 1829, and ending 16th of March, 1835, shows that, during that period, Milligan *was credited with his third of the proceeds* of the crops, in deduction of the *seven instalments* by him due for the price of his portion of the property, leaving a balance then against him of \$37,506 58; and the second, showing also the credits allowed to him *for his third of the proceeds* of the crops from the year 1835, up to the time of his death, in deduction of said price; which proceeds, after 1840, ceased to be placed to his credit as heretofore, but were replaced by sums allowed for the yearly wages of his negroes till the 30th of June, 1844, leaving a balance due by the succession on the said day, of \$35,000.

Under this state of facts, our first enquiry necessarily is into the title set up by the testamentary executor of the deceased to the one third part of the property which he seeks to recover for the benefit of the succession, and to divide contradictorily with the defendant, who pretends that the agreement above recited is not a complete sale, and that Milligan never acquired under it any other right but that of calling for its completion, on his complying with the terms and conditions therein stipulated.

It seems to us that it cannot be doubted that, when Dennistoun & Co. executed the agreement under consideration, they intended to contract a partnership with the deceased for the term of seven years, and that, for that purpose, it was deemed important and necessary that Milligan should become the owner of a portion of the property. Indeed, from the very letter of December, 1826, relied on by the defendant, it is manifest that, at that time, though intimating that he would agree to any arrangement which Alexander Dennistoun should think proper to adopt, Milligan's main object was clearly to become the owner of a part of the plantation, and to be interested one third in the purchase; and that said letter was written with a view of proposing to the firm to execute the same arrangement that had been originally contemplated between him and the deceased partner.* The agreement of 1828 was executed, after nearly two

* The material parts of Milligan's letter are subjoined:

In adverting to the death of Mr. Hill, he says: "His communications, I take it for

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years reflection upon the subject. In the mean time the deceased acted as manager for the defendant's vendors, and his interest was then fixed at one third in the property, which he was subsequently to manage and superintend for his own benefit and that of his partners. We have already seen that, by the terms of the agreement, Dennistoun & Co. agree to sell to him *for a fixed price*, payable in equal instalments, at seven years' credit, one third of the property which was to compose the stock

granted, have fully apprised you of the nature of my *engagement*, and will very much lessen the delicacy of the situation in which I am aware of being now placed. My object, therefore, in addressing you, at present, is not only to repeat with the utmost frankness what that understanding was, but to enable you also to form an opinion as to the present situation, and probable revenue that may be reasonably expected hereafter from this property. With regard to the original purchase nothing can be suggested, I am sure, that is not already known to you. It was made immediately after the two fine crops of 1819 and 1820—the most productive yet known in Louisiana, and which, by coming in succession and united with the high prices of sugar at that period, had the effect of pushing property of this description far beyond its value; added to which, the moment was additionally inauspicious, as the proprietors of fine estates were then too well satisfied with the cultivation to think of abandoning it, and all others that changed owners were at most extravagant rates, and, *where revenue was necessary from the purchase* to complete the payments, have long since ended in ruin.

“I arrived here a few months only after Mr. Hill had taken possession of the plantation, but long enough for him to have discovered the trouble and inconvenience of directing such property at a distance—indeed, without residing on it, and the impossibility of finding an overseer who could supersede the necessity of his devoting to it a large portion of his time and attention. I was here with a few negroes, with a view of purchasing land and attending to its cultivation. The peculiar position in which were respectively placed made *an arrangement* desirable to both, and there was no difficulty in our coming at once to an understanding, which we believed was founded upon reciprocal benefit and could not fail to prove advantageous to all parties. I was to be *interested* one-third in the purchase, at what it cost, allowing interest at five per cent for the first year on account of the smallness of the crop—which was then from the unusual severity of the winter, but without our knowing it, nearly destroyed—and afterwards at seven, till the whole amount was paid; placing my negroes on the property at a valuation to be agreed upon, with the exception of six I reserved, but who were also to be put into the crop, and for whose labor \$500 per annum was to be allowed—and devoting myself exclusively to the direction of its management, for which, in lieu of expenses, I was allowed by the *concern* an annual salary of \$1,000, *the agreement* to continue five years. I went immediately to work, and certainly under the impression that crops could at once be made; and had the place answered my expectations, I am very certain, notwithstanding the unfavorable season, that followed, the result would have been widely different. At that time Mr. Hill and

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in partnership; that his third interest in the ownership of said property is recognized throughout the act; that he was to add to his portion a certain number of slaves and hands, to contribute for one third to the expenses incurred thereafter by the erection of buildings and purchasing of additional negroes, and to be credited with one third of the nett proceeds of the crops. It is true, the seventh clause stipulates that the agreement is to be *regularly completed before a notary public*; but this was not made

myself were wholly unaware how much was required, both in labor and money, to put the plantation into proper operation; it had been established for the cultivation of sugar only the year before, and although everything was new everything was unfinished and incomplete," &c. After going into details of difficulties, he says: "It was of course soon evident to me, after becoming acquainted with the extent and resources of the plantation, *that although in the end it might afford a good interest for the capital invested, yet, as it was impossible to extend it on the scale we had in contemplation, it could offer no inducement as a speculation to a person situated as I was, relying almost entirely upon personal exertions to make property productive*, and expecting a result which, under the existing arrangement, I plainly foresaw in no event could be realised. Being perfectly persuaded that the motive which had dictated the offer to me had nothing in view but what was founded on mutual advantage, I had no hesitation in communicating my impressions to Mr. Hill, *who was too just not to admit their force*; but he was unwilling that any change should take place till all the improvements were completed and the estate further tested, hoping that more was to be placed to unfavorable seasons, than to want of resources and extent. He however proposed recommending its being disposed of, and, if approved of on your side, a more desirable purchase made. In the meantime he assured me, *I might feel no apprehensions with respect to the interest I had agreed to take*, which was an affair of entire indifference, *the arrangement having no other object than to secure my personal attention to its management*; that if the property was not sold, *I should always be at liberty to take the interest already offered me at a fair valuation*, or, if more desirable, a compensation should be made for the labor of my negroes, as well as for my personal services. With this understanding I was satisfied; the original agreement *was therefore never executed*, no valuation of the negroes took place, and things have since remained on that footing."

After stating his disappointments in the purchase of additional land, he goes on: "This, therefore, was the moment we had looked forward to as offering a good opportunity to realize our intentions; and I have no doubt a speculation could have been made in the course of this spring, by which not only all losses would have been retrieved but a bright and almost certain reward offered for future exertions. Such hopes and calculations on my part are of course entirely defeated by the untimely death of Mr. Hill. I can no longer indulge the expectation, that without him you could think of embarking further in a business from which hitherto you have had so little reason to be satisfied, and which alone would have been authorised upon the

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a condition of the contract, necessary to make it perfect in its essential requisites; it was for the purpose of making regular the evidence of the convention which the parties conceived would be more regular, if it was put in the shape of a notarial act; and this was to be done *as soon as possible*, that is to say, whenever the parties should be ready to go before a notary public. This might have been done the next day, for it was not necessary to wait until the expiration of the seven years, for the completion of the contract; the sale was absolute and definitive, and the seven years were only stipulated as being the period of the duration of the partnership, at the end of which, if dissolved, the value of the property was to be fixed *for settlement* (and necessarily for partition), by mutual appraisement or by public sale; and Milligan was to furnish a special mortgage on his share of the property (then ascertained), to secure the payment of the balance then remaining due on the price, with interest, until the whole should be paid. It seems to us, therefore, that the sale was complete, and that the ownership of one third of the premises became vested in Milligan from the date of the agreement; the vendors being simply his creditors for the

sanction of his judgment and the importance of his presence. As long as there was a prospect of extending our planting interest and of making our operations profitable to you, and an object to me, *I have remained satisfied and contented in my employment*. The connection was one so highly respectable as to afford both pride and gratification, and the personal intercourse that grew out of it was not only attended with pleasure but had long been cemented by the most intimate and disinterested friendship. Had fate not ordained the melancholy event which I shall long deplore, you would have been spared the pain, and I the embarrassment, of this communication. But as it is impossible for me to know what may now be your intentions with regard to this property, I have only to express my hope that, in any *arrangements* you may think proper to make, you will be satisfied so far as I am concerned, with the understanding I have endeavored to explain."

After details of the then state of the plantation, he concludes:

"I shall feel extremely anxious until I am acquainted with your intentions, and until *I have made some permanent arrangements for the future*. I must request as early a reply to this letter as your convenience will permit. I am aware the subject is one with which you cannot be familiar, and I am therefore far from asking or expecting of you any positive decision my sole motive is to call your attention to the subject, as I can have no hope of seeing you here, that such instructions may be given as you may consider just and proper. In the meantime you may rest perfectly assured that *your interest under my charge will receive the most unremitting attention.*"

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amount of the price, but being also divested of their title to the third by them transferred and sold to their new co-partner.

Now, art. 2414 of the Civil Code requires that *three circumstances should concur to the perfection of the contract of sale, to wit, the thing sold, the price, and the consent*. By art. 2431, "*the sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the payment made.*" And with regard to third persons, such sale, under arts. 2417 and 2242, has *its full effect against them* from the day of its being registered in the office of a notary and the actual delivery of the thing sold. Here, the parties had agreed upon the thing sold, and on the price to be paid by the purchaser; they had consented to the purchaser's considering the property sold as his from the date of the act, and to his applying to the payment of the price the proceeds of its annual product; the act was duly recorded as required by law, and the tradition or delivery of the thing sold had clearly taken place, by the stipulation that the vendee was to reside on the plantation and devote his attention wholly and exclusively to its cultivation and improvement. He was, therefore, possessing the property for two thirds for his co-partners, and for one third for himself, and continued to possess it in the same manner until the time of his death. The agreement was not a simple promise to sell, but was *a perfect sale*; in which, again, the vendors, *agreeing to sell* the one third of the property, the purchaser agreed on his part *to pay the sum of \$52,000 as the price thereof*. But could it be considered only as a "*promesse de vente*," art. 2437 of our Code, informs us that *it amounts to a sale when there exists a reciprocal consent of both parties, as to the thing and the price*; and, therefore, it must have the same effect. See Troplong, vol. 1, pp. 193, 194, no. 130, in which this doctrine is fully reviewed; and Merlin, Répert. verbo Vente, § 7. There is a vast distinction to be made between this case and that of *Millaudon v. Silvestre*, 8 La. 262, relied on by the defendant's counsel, and to the record of which we have been referred. There, the object of the action was to dissolve the partnership, to liquidate the partnership affairs, and to recover

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whatever sums of money might appear to be due to the plaintiff on such liquidation and settlement; *the sale of one half of the partnership property from Millaudon to Silvestre was maintained, with the vendor's privilege; the sale subsequently made to a third person of the same property, was declared collusive and fraudulent; and the plaintiff was allowed to recover the sum due him, out of the proceeds of the sale in block of the whole partnership property, without any regard to the collusive sale made in consequence of the omission to record the act of partnership under which the property was claimed.* Here, there is no fraud alleged against any of the parties; the intervenors only seek to maintain the sale for the benefit of the creditors of the deceased; the contract was a *bona fide* one, and it must be governed by the ordinary rules.

In corroboration of the impression which the agreement under consideration has made on the minds of this court, let us enquire a little further into the subsequent acts of the parties. What do we find? From 1828, the partnership premises were placed under the control and administration of the deceased; and the partnership continued to be in operation, not until the expiration of the seven years, but until the death of Milligan, who, during the whole of this period, superintended the cultivation and improvement of the plantation under the contract; his slaves and other hands were kept there all the time; and, his vendors, and subsequently the defendant, having charge, under said contract, of the sale of the crops, one-third of the nett proceeds thereof, continued, even after the expiration of the time, to be placed to his credit, so as to be imputed to the payment of the purchase money. This course was pursued until 1840. In March, 1841, the partnership was dissolved by the death of Milligan, and then the credits ceased, although the defendant continued to raise crops on the partnership plantation, with the same slaves and hands, and acted in the administration and management thereof as the *negotiorum gestor* of the representatives of the deceased. If the sale was not complete, why was one-third of the crops yearly accounted for to the deceased? Why was he charged in the accounts, not only with the instalments of the price, but also with his third of the balance of the

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money advanced for improvements? The defendant became, in 1836, the purchaser of the property, but he could not acquire any greater interest or right than his vendors had, to wit, two-thirds of the premises; and he only paid \$120,000, which is really a value adequate to the extent of said interest. Every thing shows that the title of the deceased to the one undivided third of the property, far from having ever been contested, was always recognized and respected by his co-partners, and even by the defendant, until the institution of this suit.

With regard to the fact that the whole property was mortgaged by the defendant to the Union Bank, to the knowledge and with the consent of the deceased, we cannot see how this could in any manner affect his title to the third portion of the premises claimed in this action. The mortgagor was his partner; he was largely indebted to the Union Bank; the share of the deceased was undivided; and it is not extraordinary that he should have consented to mortgage his own property to secure a debt which he did not owe, but which had been contracted by a person in whose welfare and prosperity he was greatly interested. It is true, the doctrine has been often recognized, that, if a man, having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby induces another person to purchase the estate, his silence may, under the circumstances, have the effect of making the sale binding upon him. 1 Story on Equity, § 385. 3 Rob. 332. 5 Rob. 518. This doctrine is not applicable to the situation of the parties to this suit. It would only be applicable if an attempt was made by the representatives of the deceased to dispute the mortgages, when sought to be enforced by the Union Bank; and we are not prepared to say that the silence of the deceased when the mortgages were given, ought to be so construed as to infer from it that it was, on his part, a renunciation of his title, or an acknowledgment of the defendant's right and title to the whole.

With this view of the principal question, we must come to the conclusion that Milligan, on the 16th of March, 1828, became the owner of one undivided third part of the premises; that said third formed and constituted his interest, or share, in the part-

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nership stock, then, subsequently, and until his death, under his management and administration for the benefit of the concern; that the price thereof was to be paid, and was *partly paid*, out of the nett proceeds of the crops; that he never ceased to be the owner of his interest, which belonged to him at the time of his death; and that, the same being now a part of the property belonging to his succession and inventoried as such, the plaintiff and the intervenors have a right to demand that a partition of the partnership property, until now in a state of indivision, be made in the manner provided for by law. This was ordered by the court below, and, we think, very correctly.

But the present action goes further, and it now becomes our duty to enquire into the plaintiff's and the intervenors' demand for the settlement and liquidation of the partnership concerns. It is clear that the partnership was dissolved by the death of Milligan, and that, at that time, its assets and general affairs were subject to be divided and settled according to the rights of the parties thereto. The defendant and surviving partner continued, however, to manage the property, to make crops on the plantation, and to receive the proceeds of these crops; he acted as the *negotiorum gestor* of his deceased partner's representatives, and, as such, became bound to account to them for the product of their share in the crops. He has no right to keep these proceeds, but should impute the portion thereof belonging to Milligan's succession to the extinguishment of the balance which may be due on the price of the property; and, for that purpose, we think the court *a qua* has sufficient jurisdiction; and that this case ought to be remanded, to liquidate the amount which the succession may be entitled to, as proceeding from the crop which was inventoried after the death of the deceased, as also from all the subsequent crops made on the plantation until the partition of the property.

With regard to the defendant's claim against the estate of his deceased partner, for the balance which may remain due on the price of his share in the premises in partnership, we cannot agree with his learned counsel, that it should be considered as a partnership debt, to be satisfied out of the partnership property. It is true that article 2794 of our Code says, that *part-*

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nership assets are liable to social debts, in preference to individual creditors, and that, by the 2835th article, a partner may be a creditor of the partnership; but here the defendant is not a creditor of the partnership; he is merely the creditor of his deceased partner, entitled to exercise the rights which he may have against his property, contradictorily with all the other creditors of the insolvent estate. It is true, also, that the share of the deceased in the partnership property was purchased from the defendant's vendors, with the view of its forming a part of the partnership stock; but such undivided portion was Milligan's separate property, with regard to his co-partner, though held in partnership with him, and could only be liable by preference to the payment of the debts due to the *creditors of the firm*, who, under art. 2794 above quoted, have a right to be paid out of the partnership assets, in preference to the creditors of the individual partner. This is the purport of the case relied on, in 5 Mart. N. S. 630, where the question was presented in support of a claim set up by intervention by one partner against the other, in a suit instituted by attachment against the latter, and which claim was based upon the fact of the intervenor's having advanced the funds with which the adventure had been undertaken; and it was decided, that said intervenor was the creditor of the firm for whose benefit the funds had been advanced, and that he was entitled to his right of preference. The distinction is a very obvious one. Here, again, the property was not purchased for the benefit of the partnership, but only for the individual benefit of Milligan; and it seems to us clear, that his vendor, as such, cannot pretend to set up his claim as being *a debt of the firm to be paid out of the partnership assets*. In the case of *Nathan v. Gardere*, 11 La. 265, a similar question was presented, and it was held, that *notes given by one of the partners for his share of the price of slaves purchased by the partnership, was not a partnership, but a private debt*. So, it was decided in the case of *Bernard v. Dufour*, 17 La. 596, where the question was fully investigated; and in the case of *Millaudon v. Silvestre*, so much relied on, 8 La. 262, the plaintiff was allowed to recover after payment of the partnership debts, and after having set aside a fraudulent

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sale and mortgage of a portion of the partnership property. See, also, the case of *Morgan v. His Creditors*, 8 Mart. N. S., 609.

It results, therefore, that the defendant, as an individual creditor of the deceased, is entitled to oppose his claim as a *reconventional one*, against the plaintiff's demand for the proportion of the crops due to the succession; that, as we said in the case of *Bayne v. Fox*, 5 Rob. 2, the jurisdiction of the District Court may extend to the liquidation of claims against successions set up by reconvention or compensation, so far as the two claims set up against each other may be extinguished; but that, after having ascertained and liquidated the balance, if any, that may be due to the defendant, his said balance ought to be referred to the Court of Probates of the parish of Plaquemines for classification according to his rights, and there to be ranked on the tableau of distribution of the insolvent estate, contradictorily with all the other creditors. The court *a qua* was without jurisdiction in such matters, and properly refused to pronounce judgment thereon.

We shall, therefore, abstain from expressing any opinion upon the question, whether the balance that may be due to the defendant is, or is not, secured by mortgage and privilege on the property sold to the deceased, and whether his said mortgage and privilege have been duly preserved, as this question must first be brought to its solution before the Probate Court, contradictorily with the creditors of the deceased, on the filing of the tableau of distribution by the testamentary executor.

It is, therefore, ordered and decreed, that the judgment of the District Court, so far as it goes, be affirmed; but it is further ordered and decreed that this case be remanded to the court below, for further proceedings in the partition of the partnership property, and in the settlement and liquidation of the partnership concerns, and of the crops which the defendant is bound to account for as *negotiorum gestor*, for the purpose of liquidating the balance, if any, that may be due to the defendant, according to the legal principles recognised in this opinion; reserving to said defendant his right to prosecute his claim for such balance before the Probate Court, in due course of law;

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the costs of this appeal to be borne by the appellant, and those in the court below to be paid by the parties interested in the partition, in proportion to their respective interests.*

* *Briggs and Grymes*, for a rehearing. The intervenors have contended that the agreement referred to was in effect a sale, absolute in all its attributes; that, on Milligan's death, the property formed a part of his succession, was correctly inventoried as such, and that the vendor or his representatives must go to the Probate Court, and claim against a succession confessedly insolvent, and co-ordinately with its general creditors, any amount of the purchase money yet unpaid; and that the vendor, in whose possession it has since remained, is bound to account for the crops made up to date; one-third of these also belonging to the succession of the purchaser.

What was the action of the parties to the agreement subsequent to its execution? Milligan, who, as is shown by his letter, was then a *manager of the estate*, continued to reside there, and the plantation was worked, as it had been before, under his superintendence. Nothing can be gathered from any acts of the parties calculated to elucidate the matter, till Milligan (with the view to relieve his property from the general mortgage affecting it in favor of his minor child,) settled the succession of his deceased wife, and substituted a *special mortgage* on property held, we believe, in common with his deceased father-in-law, for the one which by law affected all he possessed. In the inventory then taken, he ranks, as his separate property, one-third part of the plantation in question—but he does not offer it as security. The articles of agreement were recorded by Milligan in the parish of Plaquemines, on the 4th June, 1830. On the 24th May, 1836, Mylne and Thomson, the resident commercial partners of Alexr. Dennistoun, (who had, under a judgment of the District Court, become the sole proprietor of the plantation,) deposited with A. Mazureau, notary, a power authorising them jointly or severally to sell to themselves, or either of them, or any other person, all real estate belonging to Alexr. Dennistoun. On the 30th August of the same year, Mylne, the defendant, under this power, became the purchaser of the land and slaves, the property in question, by an act which recites the judgment by virtue of which Alexr. Dennistoun became sole proprietor, and which act was passed before the same notary, and was, as well as all the others, introduced as evidence by the counsel of the intervenors. Mylne, owner of the plantation under this act, so far as the legal effect of language could make him, applied, on the 19th of July, 1836, to the Union Bank, of which Milligan was then a director, and who, as it is admitted by the adverse party, was present at the board, and proffered, as security for 1200 shares of its stock, the whole plantation under the title just recited.

On the 13th February of the same year, Mylne mortgages (still as proprietor of the whole) the plantation to the same bank, to secure more stock; and on the 4th of January, 1839, he grants a third, still on the whole plantation and slaves, reciting the two preceding mortgages; and the mortgage is accepted on

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behalf of the bank, and signed by Milligan himself, as president of the institution. Milligan died on the 16th of March, 1841. This is all which can be evoked from the conduct of the parties towards elucidating the difficulties in the interpretation of the articles of agreement.

The question, therefore, resolves itself into this: Was the agreement a sale, or was it an agreement to give to Milligan, as he more than once expresses it, an interest on certain terms and conditions on his part, to be complied with before that interest could be converted into ownership. We contend that it amounted only to the latter. The counsel for the intervenors contends that it is a promise to sell, clothed with all the formalities of a sale, and good as such under the article which declares that *la promesse de vente vaut vente*.

Article 2431 of the Civil Code, identical with article 1583 of the Code Napoléon, declares that the sale is considered perfect between the parties, and the property of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object, and for the price thereof, although the object has not yet been delivered, nor payment made; and article 2437 (1589 Code Napoléon) that a promise to sell amounts to a sale, when there exists a reciprocal consent of parties as to the thing and the price thereof: but that, to have its effect either between the contracting parties, or with regard to other persons, the promise to sell must be vested with the same formalities as are prescribed in articles 2414 and 2415, concerning sales, in cases where the law directs that the contract be committed to writing.

Toullier, vol. 9, *Preuve Testimoniale*, c. 6, sec. 2, No. 91, in commenting on the 1589th article of the Code Napoléon, the 2437th of our Code, declares that an act, whether under private signature or not, containing a mere promise to sell, is not proof of a sale, but is a contract requiring another to perfect it; but that this supplementary act may be presumed, where subsequent possession is given or obtained. But this possession is evidently of necessity a subsequent one, or it is clear the presumption will not arise; in other words, it must amount to an act posterior to an agreement to do another act, by which it would naturally seem to follow that the condition upon which the promise had been made had been fulfilled, and that which had been executory only, became a contract executed; a presumption, as Toullier says, so strong that the Code has made it legal. "*La promesse de vente vaut vente, dit l'article 1589, lorsqu'il y a consentement réciproque des deux parties sur la chose et sur le prix.*" To which, however, he says must be added, "*si la promesse de vente est suivie de tradition ou de possession, sans quoi il est certain que la promesse de vente ne peut avoir les mêmes effets que la vente.*" He then asks, No. 92: "Why, then, has the 1589th article of the Code Napoléon enounced that a promise to sell is equivalent to sale," and answers that, anterior to the Code, jurists were divided in their opinions as to the nature of the right acquired under a promise to sell, some holding that it gave the right to claim specific performance, and some that the remedy was in damages only; that the commission charged with the formation of the Code adopted the former opinion, without perceiving that the

doctrine was inexact under the modern principles which govern the transfers of property, and which provide that *property is acquired and transferred by the effect of convention, especially sale, although the subject of the contract may not have been delivered*. "Ainsi la première vente, quoique non suivie de tradition, prévaut toujours sur la seconde, même suivie de tradition, parce que le vendeur, n'a pu transférer un droit qu'il n'avait plus." Whilst, on the contrary, he says that a posterior sale is valid against an *agreement to sell, even evidenced by authentic act*, because the property remaining in the vendor, he could transfer it to a purchaser in good faith, leaving the original vendee under promise to his remedy in damages, unless his acceptance was accompanied by subsequent possession, which, as has been stated before, would raise a presumption that the contract in *fieri* had been by subsequent proceedings converted into one in *esse*; and he adds, that if, prior to a sale to a third party, any opposition to my taking possession should be made by my vendor, it could not be maintained on my proving that *I had paid* the price, or offered on the spot to pay it—"puisqu'en vertu de sa promesse je suis autorisé à le contraindre de me passer contrat, et de me livrer l'héritage." What says Troplong? (*Vente*, No. 130.)

"Mais l'article 1589 a-t-il voulu que la simple promesse de vendre valût vente, en ce sens que, comme la vente, elle mit la chose aux risques de l'acheteur et l'en rendit de plein droit propriétaire?"

"A cette question je répondrai par une distinction. Ou la promesse de vendre est une promesse de passer un contrat ajoutée à une *vente verbale, ou sous seing privé déjà faite*, et alors le risque pèse sur l'acquéreur des avant la rédaction de l'acte authentique, car, comme le dit Cochin, il y a là *contrat parfait, absolu, sans retour*; ou bien la promesse de vendre ne vient *s'ajouter à aucune convention présente*, et alors, elle ne peut pas plus transférer de plein droit la propriété qu'elle ne faisait dans l'ancienne jurisprudence; car le Code n'a attribué à la promesse de vente que le caractère qu'elle avait dans l'ancien droit. Le nom de Cochin, invoqué par M. Portalis, en est la preuve évidente. M. Grenier, orateur du tribunal, vient la confirmer, lorsqu'il dit: 'L'usage de la promesse de vendre est aussi ancien que la vente. Il n'y avait aucun inconvénient à le conserver.'

"Ce sentiment est aussi celui de M. Toullier. 'Il est bien évident, dit-il, que la simple promesse de vendre n'a pas l'effet de transférer la propriété, puisque celui qui promet seulement de vendre n'a pas la volonté de s'en dépouiller actuellement. Il ne s'oblige qu'à la transférer par un nouveau contrat nécessaire pour cette translation. La commission chargée de la rédaction du projet de Code embrassa l'opinion des auteurs qui (dans l'ancienne jurisprudence) pensaient que les promesses de vente obligeaient précisément à passer contrat et à livrer la chose. Elle s'exprime dans les mêmes termes que les auteurs: *la promesse de vente vaut vente*, sans s'apercevoir que cette maxime manquait absolument d'exactitude, sous l'empire des nouveaux principes, qui veulent que la propriété s'acquière et se transfère par l'effet des conventions, notamment par la vente, encore que la chose n'ait pas été livrée. Ainsi, la première vente, quoique non suivie de tradition, prévaut toujours sur la seconde, même suivie de tradition.'

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parce que le vendeur n'a pu transférer un droit qu'il n'avait plus. Au contraire, la vente postérieure à la promesse de vendre, même authentique, est valide parce que la propriété ayant, nonobstant cette promesse, continué de résider sur la tête du vendeur, il continuait aussi d'avoir le pouvoir de la transférer à un acquéreur de bonne foi, sauf à celui en faveur de qui la promesse avait été faite, de former une action en dommages et intérêts contre le vendeur.'

"En conséquence, M. Toullier décide que la maxime *la promesse de vente vaut vente*, n'est absolument vraie que lorsque la promesse est suivie de tradition et de possession; sans quoi, dit-il, 'il est certain que la promesse de vente ne peut avoir les mêmes effets que la vente.' En suivant tous les progrès de l'ancienne jurisprudence, en recherchant l'origine de l'art. 1589, et en descendant dans la pensée de ceux qui l'ont rédigé il me paraît impossible de ne pas adopter l'opinion de M. Toullier. D'ailleurs, si l'on voulait prendre à la lettre les paroles de l'article 1589, si l'on ne les éclairait pas par les précédens qui ont servi à sa rédaction, on se trouverait entraîné dans les conséquences les plus fausses et les plus contradictoires avec la volonté formelle des parties. Il est déraisonnable de soutenir que la propriété est transmise de *plein droit et actuellement* à l'acheteur, lorsque le pacte intervenu entre les deux promettans fait expressément dépendre la translation du domaine *d'un fait futur, d'un fait que les contractans n'ont pas voulu actuellement consommer*.

"131. Mais sous les autres rapports, la promesse de vendre synallagmatique droit être assimilée à la vente.

"Ainsi il a été jugé par la cour de cassation que c'est à partir de l'acte notaire, passé en conséquence de cette promesse, que court le délai de deux ans dans lequel doit être intentée l'action en rescision de cette vente.

"Cet arrêt me paraît irréprochable. Il est fondé sur la combinaison exacte des art. 1589 et 1676. En effet, la promesse de vendre et d'acheter produisant une obligation de livrer la chose et de payer le prix, c'est du jour où elle a été passée que s'ouvre l'action pour s'en faire décharger.

"132. Puisque la promesse de vendre est équipollente à la vente, *il faut dire qu'elle est susceptible des mêmes conditions suspensives et résolutoires que la vente. Il est même assez ordinaire quelle soit conditionnelle; &c.*

"133. *De même que la promesse de vendre peut être conditionnelle, de même elle peut être à terme; &c.*

"134. Si les parties veulent se désister d'une promesse réciproque de vente, elles en sont maîtresses, et l'on ne saurait considérer ce désistement *comme une rétrocession de la propriété*; les tiers, qui auraient hypothèque générale sur tous les biens de celui à qui la promesse aurait été faite, ne pourraient s'en plaindre; s'ils prétendaient que leur hypothèque soit légale, soit judiciaire, suit l'immeuble dans les mains du promettant *désormais affranchi de son obligation*, ils seraient infailliblement repoussés; car l'immeuble *n'a jamais été la propriété de leur débiteur*. M. Duranton n'a soutenu le contraire, que parce qu'il est imbu de la fausse idée que la promesse de vente *transfère toujours la propriété, comme la vente même*."

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The first decision in this State upon these articles, which are identical with 4 and 9 of the old Civil Code, p. 346, is in 3 Mart. N. S., *Crosbee v. Neely and others*, p. 583, based on a memorandum which the vendor calls "Memorandum of things I do sell;" after enumerating which he says, "of all which I shall authorise a formal sale for the above-mentioned sum of seven hundred and seventy-three dollars fifty cents and a half, half of which shall be paid in December, 1811, and the other half in December, 1812, he, the purchaser, mortgaging the two lots until final payment." The vendor had not signed, but proof *aliunde* was admitted to prove acceptance; he had it recorded, *paid the price*, and the heirs entered into possession. The defence was, payment to a party not authorised to receive it. The court decided that, admitting this fact, it was proof of assent, and the memorandum was a sale *sous seing-privé*.

In the case of *Josephs v. Moreno*, 2 La. 460, the decision is to the same effect. The claim was for specific performance of a promise to sell one-half of a tract of land, on payment of one-half of the purchase money. Assent was proven, as in the case last cited, and the court decreed a conveyance within ten days' notice of the decree, *on payment or deposit of the price stipulated*.

The last case is *Long v. French*, 13 La. 258. The memorandum was as follows: "B. F. French sold to Wm. Long one lot, &c.; terms, \$200 cash, and assumption of mortgages;" signed by both. The refusal to comply appears to have been grounded upon the refusal of the vendor to warrant the property sold. It was in evidence that the \$200 *had been paid*, and assumption of the mortgages *offered*; in other words, the terms of the contract were completed, and the court decreed specific performance.

Granting that the articles of agreement amount to a promise to sell, we contend that it is established by the authorities quoted, that the expression *promesse de vente vaut vente*, means no more than that when the agreement is complete by the assent of the purchaser, and has become a synallagmatic contract, it is obligatory upon both parties, and that on the refusal of either to confirm the contract by an actual deed of transfer, or the payment of the stipulated price, the recusant can be coerced by application to a competent tribunal, which, as Trolong observes, is a force which *it possesses in common with an actual sale*.

Were this agreement a mere contract in the shape of a promise or agreement to sell at a fixed price, we admit that, under the authorities cited, Dennistoun would have been obliged to comply with its terms; that it created a right of which Milligan could have availed himself, *on a compliance with the conditions by him to be performed*, and until then was inchoate only; and that, in all the decided cases quoted, as well as in those contemplated by the commentators, the relief was granted to the promisee, where the promisor refused to complete the sale, *after proof that the price had been paid, or real tender offered*.

What are the facts of this case? Milligan, in his letter, admits that the original purchase was made under an understanding that he was to have *an interest*, the leading terms of which he there details. After the experience of some time he finds the speculation unpromising, and, upon stating his reasons,

tells Hill that he is inclined to withdraw. What says Hill?—"who was too just not to admit their force."—"He assures him, that he might feel no apprehension with respect to the *interest* he had agreed to take, which was an affair of entire indifference, the *arrangement* having no other object than to secure his personal attention to its management; that if the property were not sold, he should always be at liberty to take the *interest* already offered him." On this assurance then, and as manager of the property, he remained until the death of Hill and the arrival of Dennistoun, who elected to continue working the plantation, and entered into a new agreement, the former one, as Milligan himself declares, never having been executed.

What are the terms of this agreement? Dennistoun agrees to sell to Milligan one-third of the plantation and slaves for fifty-two thousand dollars—payable in one, two, three, four, five, six, and seven years, in equal instalments, without any interest until the end of the contract; and, on whatever sum may be then unpaid, Milligan is to pay six per cent interest, and to give a special mortgage on the property until the whole is paid: Against this waiver of interest, Milligan was to give the services of ten slaves, and six negroes *in statu liberi*; we say he was to do so, because it is a reasonable construction of the two clauses, and because the court will find that from the *end of this term interest is charged, and wages allowed Milligan for the negroes*. Milligan is to reside on the plantation and manage it, and for these services is to receive one thousand dollars a year. The contract was to last for seven years, at the end of which period, if agreeable to all parties, it was to be renewed; but if a *dissolution* should take place, the value of the property was to be fixed for settlement by mutual appraisement, or by public sale.

Now, this is all the agreement contains in the nature of a contract translativ of property. What is it but an agreement or promise to sell on a suspensive condition, to wit, the will of the parties at the end of seven years, and the giving of a mortgage to secure the purchase money unprovided for at the expiration of that term?

Had the parties intended a present transfer of title to the land, would Dennistoun have stipulated for a mortgage at the end of seven years to secure a balance, when he jeopardized through that period *the safety of the whole*? It is clear that Milligan was not called upon to give security until the end of this period. What would have been the effect of judgments against him through the period which preceded it, or, if he were proprietor, of mortgages or sales?

Admitting this contract to be one to which the article of our Code is applicable, it was *suspensive in its operation*. The interest, like the springing use at common law, came into legal and perfect existence when the condition on which it depended had been complied with, and not before. But we deny that this agreement amounts to such a promise to sell as is contemplated by the Code, or the commentators referred to. We contend that the intention of the parties was to form a co-partnership, the stock in trade of which was the property in question—the business to be carried on, the production of sugar. The language of the agreement can bear no other construction. After reciting

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the agreement to sell at terms extending through seven years, and providing, in the fourth article, the means by which Milligan was prospectively to become interested in the capital, to wit, the yearly appropriation of one-third of the profits to which his interest was to be limited, the fifth expressly declares that the *contract* should exist for seven years, *renewable or determinable* at the option of either party; and that, in case of *dissolution*, the value of the property should be ascertained by mutual appraisement, or by sale; and in the first article, and *coupled with* the agreement to sell, it is stated that, at the *end of the contract*, on whatever sum may remain unpaid, Milligan was to pay interest at six per cent, and give a special mortgage to secure the balance. Why was the mortgage to be given at the end of the seven years? Because it was not until that period that he could be considered an owner of the soil, and because he had not, until he had performed the acts then stipulated, *the power to give it*. This right was to be acquired by the gradual appropriation of the share given him of the profits.

The features of this case are identical with those of *Millaudon v. Silvestre and others*, 8 La. 262, although the garbled manner in which the statement of facts is given by the reporter might well make its identity difficult of apprehension. In that case, as will be seen by referring to the original record, Millaudon, on the 3d January, 1833, filed in the District Court of the First District a petition, alleging that, on the 17th February, 1830, he entered into partnership with L. & J. L. Silvestre, for the special purpose of manufacturing rum and carrying on a sugar refinery; that, relying on their care and industry, he confided to *their entire possession and management* a large and valuable property, *composing the capital of said partnership*; that Silvestre *père et fils* have neglected their duties, whereby the property has been greatly deteriorated; that they have refused and neglected to pay the whole, or any part of the sums of money stipulated to be paid by said articles, either for capital or interest, or to purchase the necessary means of working the establishment, and have allowed it to suspend its operations, and by their continued neglect have induced disorder and loss, which must be borne by petitioner; that, under the hope of amendment, petitioner has continued to make advances, so that the concern is indebted to him, *exclusive of the capital*, in the sum of \$74,603 33, for one-half of which the defendants are liable, but which they refuse to pay; that the concern might yield profit, but as conducted must result in final ruin. He prays for a decree that the partnership be dissolved; that liquidation be ordered, and that defendants be ordered to produce books, &c. that the lands, slaves, buildings, &c., *be sold to accomplish liquidation, and discharge debts of concern*; that he have judgment for half the sum of money so due him for advances; that he have judgment for the *interest due on capital, as stipulated in said articles, and for the amount of said capital*, and for general relief. The act of copartnership, annexed as part of the petition, is as follows:

“Les soussignées, Laurent Millaudon d'une part, et Louis Silvestre et Jean Louis Silvestre, associés en cette paroisse sous la raison de Silvestre père et fils d'autre part, désireux de posséder en commun et continuer l'établissement connu sous le nom de distillerie de Fort & Clement, conviennent de ce qui suit :

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"Laurent Millaudon vend a Messieurs Silvestre père et fils, la demie de cette propriété connue sous le nom de distillerie, autrefois à Fort & à Clement, ensuite à Abraham Miller et L. Millaudon, et actuellement à ce dernier en seul. La dite propriété située dans le fauxbourg Lacourse, près de la ville, contenant, 10. sept terrains;" &c. &c.

Les batisses établissemens dessus et tous les articles énumérés dans le présent sont estimés à quatre-vingt mille piastres, y compris les esclaves et pris en société pour la dite valeur au comptant, la demie vendue à Messrs. Silvestre père et fils est de quarante mille piastres.

Messrs. Silvestre père et fils vendent la demie des esclaves et objets, ci-dessous énoncés, et qu'ils portent dans la présente société, &c.

Lequel total de six mille piastres, montant des objets à Messieurs Silvestre, père et fils, ils en vendent la moitié à L. Millaudon, soit trois mille piastres, lesquelles deduites des quarante mille piastres ci-dessus, ils restent redevables au dit L. Millaudon de la somme de trente-sept mille piastres, valeur de la moitié de l'établissement, distillerie, édifices, et autres objets, et pour cette balance due à L. Millaudon, de trente-sept mille piastres, Messrs. Silvestre père et fils, s'obligent à payer jusqu'au remboursement final, un intérêt de six pour cent. l'an, à dater de 10 Février, 1830, et payable au dit Millaudon à la fin de chaque année. Le dit établissement dans son état actuel, tant pour la portion fournie par L. Millaudon et celle de Silvestre père et fils est estimé à la somme de quatre-vingt-dix mille piastres; le but des intéressés étant de le faire valoir, tant pour y continuer les spiritueux, que pour y travailler les sucres, ils conviennent de ce qui suit:

Art 1. Silvestre père et fils, s'occuperont exclusivement de l'établissement ci-dessus, ils ne feront d'autres affaires que pour le même, et ils y donneront tous leurs soins et temps, &c.

2. Silvestre père et fils pour leur travail, peines et soins et attentions, de même que pour leur temps donnés à l'établissement auront droit à une somme de deux mille piastres par an, laquelle leur sera payée par l'établissement et fera partie des dépenses du même, &c.

7. A chaque balance aux époques mentionnés ci-dessus, les comptes respectifs des intéressés seront débités des pertes et crédités des profits; les pertes où profits étant supportés par portion égale, L. Millaudon la moitié, Silvestre père et fils l'autre moitié.

8. Sur la moitié des bénéfices résultants à Silvestre père et fils seront d'abord prélevés les intérêts qu'ils doivent sur le prix de leur moitié, et l'excédent, s'il y a un payment de cette même moitié de l'établissement, vente que le dit Millaudon leur passera à l'acquit de cette même moitié.

13. La présente société est pour le terme de cinq ans, à dater de ce jour dix-sept Février, 1830, &c. &c.

Nouvelle Orléans, le dix-sept Février, dix-huit-cente-trente.

(Signé)

MILLAUDON,
SILVESTRE, père,
J. Ls. SILVESTRE.

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Millaudon then filed a supplemental petition, in which he alleges : That since filing the petition he had discovered that the defendants did, on the 25th August last, clandestinely, collusively, and without the knowledge and consent of your petitioner, and without any right or title thereto, sell and convey, by act before C. Pollock, to John Morris Bach, of the city of New Orleans, half the property, moveable, immovable and slaves, which constituted the capital stock of the partnership set forth in the original petition, which sale was made with the view to defraud the petitioner of his property, and convert the same to his own use. That since said sale defendants had appropriated to themselves all the rents, profits and proceeds of the said property, without any payment or satisfaction to your petitioner. That defendants, Silvestre père et fils, are in possession of said property; that he believes it will be deteriorated and fraudulently disposed of, and the whole put without the reach of process, to his damage and loss. He, therefore, prays for a sequestration; that the facts set forth be taken into consideration in deciding on the prayer of the original petition; that Bach and Dufour, the pretended vendees, be made parties; and that the sale, and mortgage thereon granted to Dufour, be declared void, and his property decreed to be restored to him, or sold for the liquidation of the affairs of the partnership.

Bach and Dufour, pleaded the general issue, &c. Silvestre père et fils, pleaded the general issue, averring that, on the 17th February, 1830, they entered into a synallagmatic contract, under private signature, with the plaintiff, whereby he sold to them, for the consideration therein expressed, one undivided moiety of certain real estate and slaves therein described, for the consideration therein expressed. They aver that by this act of sale, the full and absolute ownership of one undivided moiety of the whole vested in them, and that they were at liberty at any time to dispose of the same, except as to the use of the premises which was reserved for the use of the partnership for the time it was to last. That all obligations imposed on them had been complied with, thus denying that the concern was losing. They aver that from the commencement, plaintiff took the entire management of the concern into his hands, without consulting them, and that if it be unprofitable it results from his fraudulent practices; that the mode of payment, both of interest and capital of the balance due to the plaintiff, is provided for by the contract itself; and they aver that plaintiff's own acts have stopped them from finally discharging the same. They deny that any sum was due to him, or, if so, aver that it was covered by the proceeds of sales, and shipments made by plaintiff unaccounted for; and as for the balance due on the price of the sale, contend that plaintiff has no right of action in the form in which the suit is brought, because owing to his own wrong the condition stipulated was not complied with and the payment fulfilled. They aver that the sale was *bona fide*, openly and publicly made; that they had a right to make the same, having reserved the use for the period of the partnership. They pray for a dissolution of the sequestration, as the profits of the term would have equalled the purchase money unpaid, and for general relief, &c.

The settlement of accounts was referred by the court to auditors, who reported a balance due to the plaintiff of \$39,490 76 and \$37,760 84, making together

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the sum of seventy-seven thousand two hundred and fifty-one dollars and sixty cents; the distillery and utensils, buildings and slaves belonging one half to each of the parties. This report was afterwards corrected by the court, and reduced to \$68,067 77.

The court rendered judgment, that the partnership be dissolved, that Millaudon recover from Silvestre père et fils, \$68,067 77, with costs. That the property described in the articles of partnership, and sequestered, *be sold to satisfy the debt, and in block as incapable of division.* That the act of sale to Bach be made null and void, and the mortgage therein stipulated cancelled and annulled. In giving his reasons for the judgment, the district judge, says: "This act contains: 1. A preamble of their general agreement and intentions. 2. Special articles of agreement. The preamble recites that Millaudon and Silvestre père et fils, being desirous to possess in common and to continue the establishment known by the name of the distillery of Fort & Clement, agree as follows: *Millaudon sells to Silvestre half of the distillery, describing the lots and property minutely, also the slaves and distillery utensils, the whole estimated at \$80,000, and put into the partnership at that price cash. The half sold to Silvestre is \$40,000. Silvestre sells to Millaudon certain slaves and utensils valued at \$6,000; and deducting \$3,000 there remained due to Millaudon \$37,000, the value of half the distillery, edifices, and other objects, on which sum Silvestre binds himself to pay Millaudon an interest at the rate of six per cent until its final reimbursement. The whole establishment is estimated at \$86,000. The 8th special article provides that, from half of the profits coming to Silvestre, there shall be taken annually the interest they will owe on the price of the half; and the excess, if there be any, is to go towards the payment of that half of the establishment, a sale of which Millaudon will pass to them on payment of that half. The other articles are irrelevant.*

"I am fully aware of the article of the Code and the decisions of the courts, that *an agreement to sell, is a sale; but that does not prevent making of conditions, upon the fulfilment only of which it is to take effect.* If a party make a sale, upon condition that the buyer pay down the price, it can have no effect till the price is paid down. If half only is paid, the buyer has a certain interest in the property, but cannot be said to be owner till the whole price is paid. *This whole contract must be taken together, and when Millaudon says he sells, the paragraph of the 8th article must be added—that when full payment is made he will pass title.* If we look to his intention, as clearly gathered from the act, it cannot be said that he intended to pass a title at that moment. *It is an agreement in relation to the sale of lands, and which has certain effects, but it is not a sale.* His contract is especially open to interpretation by intention; it is a complex contract, with many special clauses; it is a contract of partnership, in which if there be any obscurity, intention is to be looked for. *The words of the 8th article being a special stipulation, are to control the more general terms of the preamble; and, it is clear, from the 8th article, that there was no intention to vest present title. The words of the preamble are in the present tense, but it is well known that this form of expression is frequently used with a future sense. The speaker or writer regards more the in*

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tentions which are at the moment operating on his mind, than the future acts which are the result of those intentions. I repeat, if the whole act be taken together, viz: all those parts which relate to title and ownership of the property, it clearly was not the intention of Millaudon to convey any title till the property was paid for, and this intention is clearly to be gathered by any man who reads the instrument with a wish fully to be informed of its meaning. But another view of the subject is to be taken.

"I am aware of article 2796 of the Civil Code, and of the case in 3 La. 494; but I do not consider that that article prevents the parties from converting real estate, and slaves even, into commercial partnership property, if they see fit. There is nothing prohibitory, and no policy of law, against it. I consider the article as a mere general definition and description of a commercial partnership, as ordinarily entered into; not as containing any restriction on the right of parties to contract as they see fit, &c."

It will be seen that here, as in the case under consideration, Millaudon was sole proprietor; that he sells a moiety of the premises, and that the vendee, as is the case with Milligan, is in what is termed *possession of the premises*. It is true that the object of the parties in making the sale is here expressly declared to be a partnership, whilst in our case the intention is inferred from language which, to our apprehension, is unequivocal. The lower court held the instrument one to be construed by intention, and that the words of conveyance were to be controlled by the context, and that *title did not pass*, but that the property remained in Millaudon until fulfilment of the conditions on which the sale was predicated, it being a partnership capital for which Silvestre was still indebted to the firm, or if the court please, to the plaintiff. Had the words, *Millaudon sells to Silvestre*, conveyed a right of property, the court could only have given judgment for the debt; and, however it might have dealt with the personalty, it is clear the realty could have been got at only by an hypothecary action, or by an ordinary sale under execution.

It is clear then that the lower court did not consider that the property had changed hands.

What was the decision of this court on appeal? "That all the property mentioned and described in the articles of partnership, and which has been sequestered in this suit, be sold to satisfy this debt and judgment, and that it be sold in block as incapable of division, viz: the land, buildings, dwelling, refinery and distillery utensils by themselves, and the slaves by head." A decree which, for the reasons already urged, involves a necessary adherence to the views entertained by the lower court, as it would otherwise be in violation of all law.

In the opinion of the court in the present case, they say: "Let us inquire a little further into the subsequent acts of the parties; and what do we find? From 1828 the partnership premises were placed under the control and administration of the deceased," &c. This is not the fact; they had been so placed from the date of the original purchase, and so continued throughout the whole interval between that time and the signing of the articles of agreement, and so continued till Milligan's death; no change was effected, no possession given; he was, prior to the agreement resident on the land as manager—he was so afterwards; and

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paid as such, though, through the generosity of his partner, clothed with prospective rights of ownership. The court asks why, if the sale were not complete, was he charged with one third of the disbursements for improvements, and credited with one third of the proceeds? The answer appears to us plain. We admit that he had the right to claim a third, on the fulfilment of certain conditions of which these formed a part, and because he was entitled under the agreement to these credits, and was obliged to contribute to the augmented value.

The court say "that, with regard to the defendant's claim against the estate of the deceased partner, for the balance which may remain due on the price of his share in the premises in partnership, we cannot agree with his learned counsel, that it should be considered as a partnership debt, to be satisfied out of the partnership property."

The 2794th article of the Civil Code declares, that partnership property is liable to the creditors of the partnership in preference to those of the individual partner; but the share of any partner may, in due course of law, be seized and sold to satisfy his individual creditors, *subject to the partnership debts*; but such seizure, if legal, operates as a dissolution of the partnership." The 2835th article: That "a partner may be a creditor of the partnership, *not only for the sums which he has disbursed, but likewise for the obligations which he has entered into, bona fide, for the partnership, and for the losses reasonably incurred in his administration.*" The latter article is, in effect, and nearly in words, identical with art. 1852 of the Code Napoléon, which declares that, "Un associé à action contre le société, non-seulement à raison des sommes qu'il a déboursées pour elle, mais encore à raison des obligations qu'il a contractées de bonne foi pour les affaires de la société, et des risques inséparables de sa gestion."

Pothier, Société, in chapter 7, which treats "Des choses dont un associé peut être créancier de la société, et dont les autres associés sont obligés de lui faire raison, chacun pour la part qu'il a dans la société," says, no. 126: "Lorsqu'un associé a mis dans la société des choses dont il ne devait que la jouissance par le contrat de société, il est créancier de la société pour lesdites choses, qui doivent lui être restituées lors de la dissolution de la société." He adds, that if the objects were not of a nature to sell, and which he was to take back in specie, they remain at his risk; if, on the contrary, they were saleable, or subject to deterioration, and had been contributed under valuation, he is a creditor, not for the things, but for the value. The source from whence was derived the 2835th article of our Code, is no. 128, where Pothier says: "Un associé doit être indemnisé par la société non-seulement des déboursés qu'il a faits et des obligations qu'il a contractées directement et principalement pour les affaires de la société; il doit parreillement l'être des risques et des hasards qu'il a courus, lorsqu'ils étaient inséparables de la gestion qu'il a eue des affaires de la société, et qu'il ne les a courus que pour les-dites affaires:" and here we would specially call the attention of the court to the reasons given, which furnish a clue to a doctrine universally acknowledged in the courts of England: "Car la société devant avoir tout le profit qui résulte de cette gestion, il est équitable qu'elle supporte tous les risques. *Ubi lucrum, ibi et periculum esse debet.*"

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Favard, verb. Société, chap. 2, sec. 5, § 2, holds the same doctrine: "La société devant profiter de tous les gains et bénéfices qui peuvent résulter de la gestion de ses affaires, elle doit supporter toutes les dépenses que cette gestion peut occasionner, et, par suite, elle doit indemniser l'associé qui en est chargé de toutes les pertes qu'il a éprouvées, et de toutes les dépenses qu'il a été obligé de faire, par suite des risques inséparables de sa gestion."

Delvincourt is to the same effect. Vol. 3, page 122, § 11, 12, 13.

At common law this principle is universally acted on, not only as a legal but as an equitable principle. Gow, page 235, in speaking of the consequences of a dissolution says: "The joint property being disposed of, the joint creditors have primary claim in the fund constituted by its produce. This is consonant with the principle, *qui sentit commodum sentire debet et onus*; as partnership property has been acquired by the means of partnership debts, it ought to be first applied in discharge of them."

Story, in his treatise on Partnership, p. 135, says: "Besides this community of interest in the capital stock, funds and effects of the partnership, each partner has certain rights, liens, and privileges thereon. In the first place, no one partner has any right or share in the partnership property, except what remains thereof after the full discharge and payment of all the debts and liabilities of the partnership; and, therefore, each partner has a right to have the same applied to the due discharge and payment of all such debts and liabilities, before any one of the partners or his personal representatives, or his individual creditors, can claim any right or title thereto." "Each partner has also a specific lien on the present and future property of the partnership, not only for the debts and liabilities due to third persons, but also for his own amount or share of the capital, stock and funds, and for all moneys advanced by him for the use of the firm, and also for all debts due to the firm for moneys abstracted by any other partner from such stock and funds beyond his share." "Hence it may be stated, as a general corollary from the foregoing considerations, that no separate creditor of any partner can acquire any right, title, or interest in the partnership stock, funds or effects, by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner, as his share or balance, after all prior claims thereon are deducted and satisfied."

Suppose the case of a partnership for a term of years, in which the capital is wholly furnished by the one, an interest immediate in the profits, and contingent in the capital, given to the other, to wit, on his contributing certain sums at stated periods. So long as the concern goes on well, the working partner, as he is called, receives the benefits arising from the employment of his partner's capital, and, at length, by contributions on his part, becomes an owner of the stock to the extent of his share. Now reverse the case, and suppose the concern results in loss, according to the doctrine established by the court, the capitalist, as we admit, is first bound to pay all social debts, to the amount, not of the share he has in the profits, but as though he had been alone liable. The articles of copartnership bind him to this extent; but when the converse of the rule is sought to be enforced, we are told that, for this payment, on behalf of the firm, of

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debts which his copartner was bound to liquidate, he is not a creditor of the firm, but of the individual partner, to whose estate, in common with a mass of individual creditors, he is to look for payment, and of which his share in the residue of partnership assets, if such there be, will form an item.

We can establish no distinction between the advance, on the creation of the partnership, of the whole stock in trade by one partner, and subsequent advances or sales he may make to it during its continuance, and we confess our inability to seize the distinction as laid down by the court. Much difficulty is created by the imperfect state in which our law is left by the Civil Code. We are referred to laws which have never been enacted, and, in the absence of enactment, are sent to seek such law as we may find. We have shown that, under the French law prior to the Code, partners of the firm were its creditors for advances made or risks or obligations entered into for its benefit, upon the principle that *ubi lucrum ibi et periculum esse debet*, and that writers since that period have laid down as law the same doctrine; that both at law and in equity, in a country in which this subject is perhaps as fully understood, and the interests of parties as carefully guarded as in any upon earth, the principle is recognised; and that the same has been sanctioned by the writers and decisions in this country.

What are the decisions in this State upon the subject? The case of *Purdy et al. v. Hood et al.*, 5 Mart. N. S. 630, expressly recognises the doctrine. We do not comprehend the distinction drawn by the court, between this case and the one at issue. The court says, "the distinction is a very obvious one; here, again, the property was not purchased for the benefit of the partnership, but only for the individual benefit of Milligan; and it seems clear that his vendor, as such cannot pretend to set up his claim as being a debt of the firm, to be paid out of the partnership assets." In the case quoted, the attaching creditors recovered, because they proved that they alone had furnished the means of payment for the property attached, and they were held to be creditors of the partnership, and their right to claim against an individual creditor of their partner established.

Where does the court find authority to say, that the property was not purchased for the partnership, but for the separate benefit of Milligan? It was originally bought, it is true, with reference to his interest, *which he rejected*; after a lapse of about eight years, *he changed his mind*, and was, when the property had become wholly that of his partner, admitted into the concern. But the putting in of the capital was an act of Dennistoun alone, and for it he surely had the rights and remedies accorded, under the principles we have expounded, to partners who thus become creditors of the firm for advances they have made on its behalf. *Without this contribution could the partnership have existed, or the profits have been realized? Unless the partnership had been the inducement, would the sale have been made?*

In *Nathan v. Gardère*, we confess that the court seem to have entertained an opinion adverse to our views, but we are obliged to say, with all respect to its opinion, that it is one which cannot be reconciled with what we conceive to be sound law, and at any rate it can rank but as a dictum, the case having been decided upon the ground that the property, for the purchase of which the advance was

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claimed to have been made, was separated from the stock in trade by the act of the claimant, and had ceased to be partnership property.

In the case of *Bernard, Syndic, v. Dufour*, 17 La. 598, the parties were partners in a commercial firm, and purchased, as a matter of speculation, real estate, it is alleged, with means furnished by the firm; but the property was not purchased as essential to the carrying on of the copartnership; it was bought by what, had the concern gone on well, would have been the profits, which they had a right to use as they thought fit; and in this view of the case, certainly, would have been individual property. Did the failure of Paloc change its nature? The court decided it did not, and we conceive correctly; because this was not an advance on account of the firm, by which its creditors were or might be benefited, and which claims protection under the maxim we have already more than once cited, but a conversion, by both partners, of means which they might, in the like manner, have spent in wine or horses.

We now come to the case of *Millaudon v. Silvestre*, which winds up the authorities referred to in the judgment, and we contend, as we have already contended, that it is conclusive on the subject.

The court, in adverting to this case, has said: "There is a vast distinction to be made between this case and that of *Millaudon v. Silvestre*, 8 La. 262, relied on by defendant's counsel, and to the record of which we have been referred. There the object of the action was to dissolve the partnership, to liquidate the partnership affairs and to recover whatever sums of money might appear to be due to the plaintiff on such liquidation and settlement. The sale of one-half of the partnership property from *Millaudon to Silvestre* was maintained, with the vendor's privilege. The sale subsequently made to a third person, of the same property, was declared collusive and fraudulent; and the plaintiff was allowed to recover the sum due him out of the proceeds of the sale, in block, of the whole of the partnership property, without any regard to the collusive sale made in consequence of the omission to record the act of partnership under which the property was claimed. Here there is no fraud alleged against any of the parties; the intervenors only seek to maintain the sale for the benefit of the creditors of the deceased. The contract was a *bona fide* one, and must be governed by the ordinary rules."

We are at a loss to conceive whence these inferences can be drawn. That the partnership amounted to, or was in effect a sale, was expressly denied by the judgment of the lower court, and the decree was rendered upon the ground that no title had or could pass by it. The property was partnership assets, and was to be sold as such; and the auditor's report shows that the capital contributed there, as in our case by the monied partner *Millaudon*, was a debt which he had a right to claim out of the partnership assets.

The fraudulent sale to *Bach and Dufour* was a mere accessory to the original question at issue. The suit was commenced in the form in which it terminated, in ignorance of the whole transaction; it was by a supplemental petition that this feature was disclosed, and the court, in avoiding the sale, merely decided that it was a transaction which could not interfere with the right the plaintiff had, to exercise in the matter originally prayed for, his right as a partner.

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In conclusion, we have to offer a few remarks upon the kind of estate which partners take in real estate, when made the capital of a copartnership. In *Skillman v. Parmele and others*, 3 La. 494, the court, quoting the 2796th article of the Code, defining commercial partnerships, and remarking the exclusion of immovables in the subjects enumerated, says: "If the purchase of slaves or real estate were not only convenient, but indispensable to carry on the commercial partnership, there would be great strength in the argument that the law allowed such things to become partnership property, for *where the law gives the end, it grants the means*. But in our view, it is by no means essential that either land or slaves should be acquired by the firm, to enable it to have the enjoyment or use of them. If either or both are required to facilitate their business, they may purchase them, and with any funds they please; but as the law confines their partnership to personal property, they will be *joint owners, not partners*."

"This view of the subject will become more clear by again referring to the definition in our Code of a commercial partnership. It is stated to be, for the buying and selling of personal property as agents, or carrying personal property for hire. The purchase of slaves or houses, to enable the firm the more conveniently to do these things, comes within no branch of this definition; and consequently is not an act which can be done by a commercial partnership. If land or slaves could become partnership property, where the firm was mercantile, it would follow that they must be governed by commercial law. The Code of Commerce in France does not, like ours, limit, in express terms, commercial partnerships to personal property; but notwithstanding the greater latitude of its definition, it is considered there that such an association can only act on things which are moveable. *Code Com. Note by Paillet, Manuel de Droit Français.*"

In *Baca v. Ramos and others*, the court says: "The act of sale by which the premises was acquired shows that the purchase was made by the parties to this suit as partners trading under the firm of Joseph Ramos & Co., and a note was given for one-half the price, bearing the signature of the firm. The partners were *joint owners*, and either of them might have sold his undivided share, or interest, in the property (3 La. 496), but in case of such seizure and sale he must have accounted to his partners for the price, nor could he have occupied any part of the property for his private use without compensating his copartners. In fact, the title to one undivided third was in him, but the value thereof belonged to the partnership. When the plaintiff withdrew from the partnership, and received a given sum, he relinquished his interest in the value of the house and lot in question to his copartners. He has therefore no right to demand a sale for partition, as, immediately after it, the price, being the value of the premises, would instantly become the property of the defendants."

"The distinction which we have taken between the title by which property is held, and the value thereof, is well known in other States of the Union where the common law prevails; these rights are there distinguished as 'legal title' and 'equitable title;' there courts of equity enforce the rights of the equitable owner, by compelling the legal one to make a conveyance, precisely as we did in the case of *Hale v. Sprigg*, 7 Martin, 243."

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In the case of *Paloc v. Dufour*, already cited, the court says: "The documentary evidence in the record shows that H. Paloc and C. Dufour became joint purchasers, each of one undivided parcel of ground situated at the corner of Dumaine and Burgundy streets, on which they caused the said six houses to be built. The Louisiana Code, art. 2777, provides that a community of property does not, of itself, create a partnership, however that property may be acquired, whether by purchase, donation, accession, inheritance, or prescription. If the parties had contemplated making, in relation to this property, an ordinary and particular partnership, they would no doubt have reduced it to writing, and had it recorded."

From the principles established by these decisions, we must conclude—

1st. That immovables may become the subject of particular partnerships.

2d. That although the partners take title as joint owners, when the purchase is by partnership funds they are but trustees for the partnership; or, in other words, are bound to account to the firm for the advance or price, and this where, as in the case last cited, the purchase made was not with a view to the object for which the partnership was formed.

Now the Code, in giving the preference to social creditors on the assets of the partnership, and in declaring that partners may be creditors of the firm for advances made to it, must have contemplated ordinary partnerships, because, by art. 2823, it is declared, that "the particular rules by which *commercial partnerships* are governed will be found in the Commercial Code. All the provisions not repugnant to those contained in that Code, are also applicable to commercial partnerships.

Story says, in his treatise on Partnership, p. 126, § 91, 92: "The true nature, character and extent of the rights and interest of partners in the partnership capital, stock, funds and effects, is therefore to be ascertained by the doctrines of law applicable to that relation, and not by the mere analogies furnished by joint tenancy or by tenancy in common. It may, therefore, be said, that in cases of real partnerships, *unless otherwise provided for by their contract*, partners are joint owners and possessors of all the capital, stock, funds and effects belonging to the partnership, as well those which are acquired during the partnership as those which belong to it at the time of its first formation and establishment. So that whether its stock, funds or effects, be the product of their labors or manufactures, or be received or acquired by sale, barter or otherwise, in the course of their trade or business, there is an entire community of right and interest therein between them; each has a concurrent title in the whole, or, as Bracton says, *tenet totum in communi, et nihil separatim per se*.

"Nor is there in reality, as between the partners themselves, any difference, whether the partnership property, held for the purposes of the trade or business, consist of personal or moveable property, or of real or immovable property, or of both, so far as their ultimate rights and interests therein are concerned. It is true, that at law, real or immovable property is deemed to belong to the persons in whose name the title by conveyance stands. If it is in the name of a stranger, or of

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one partner only, he is deemed the sole owner at law : if it is in the names of all the partners, or of several strangers, they are deemed joint tenants or tenants in common, according to the true interpretation of the terms of the conveyance. But, however, the title may stand at law, or in whosoever name or names it may be, the real estate belonging to the partnership, will in equity be treated as belonging to the partnership like its personal funds, and disposable and distributable accordingly ; and the parties in whose name it stands as owners of the legal title will be held to be trustees of their partnership, and accountable accordingly to the partners, according to their several shares, rights and interests, in the partnership, as *cestuis que trust*, or beneficiaries of the same. Hence, in equity, in case of the death of one partner, there is no survivorship in the real estate of the partnership, but his share will go to his proper representatives."

In *Millqudon v. Silvestre*, the court decided strictly on these principles ; the real estate and slaves were considered, alike with the moveables, partnership assets ; the title of joint ownership or joint tenancy did not vest in the Silvestres, because it was, in Judge Story's language, "*otherwise stipulated in the contract*;" but the interest was joint, and properly so treated.

In *Baca v. Ramos*, 10 La. 417, these doctrines were to a certain extent admitted. In the other cases cited, the adverse seems to have been the opinion of the court ; the difficulty of *stare decisis* exists in the way of either position, for they are hardly reconcilable with each other ; but the case of *Silvestre* was more elaborately argued, and involved interests of very much larger extent, and we confess our conviction that it is more correct in principle, and as such should rank as the ruling case.

At all events, whether treated according to the doctrines of the commercial law of England, the *Lex Mercatoria* of the United States, or by the more limited and technical views taken by the Civil Code, we are entitled to rank as creditors of the firm ; and as such to be paid by preference out of the assets. Or, if the court should still be of opinion that the articles operated as a sale translatif of title, we think we have shown that it was conditional only, and was inchoate or rested in right, until the conditions upon which it was stipulated were performed, these conditions being of the essence of the contract, which was in itself complex, indivisible, and incapable of partial execution. Civil Code, arts. 1950, 1945, 1940 § 5.

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An action of revendication of real property may be instituted before the court within whose jurisdiction the property is situated, though the domicile of the defendant be in another district, or before the court of his domicile, at the option of the plaintiff. C. P. 163.

The Commercial Court of New Orleans has no jurisdiction of petitory or possessory actions. Act of 14th March, 1839, s. 3. But where an exception to its jurisdiction on that ground, has been improperly overruled below, the Supreme Court will examine and decide the case on its merits, under the fourth section of the act of 14th March, 1839, which declares that "no judgment rendered in the Commercial Court shall be void for want of jurisdiction, but in case it be determined that the court had not jurisdiction of the case, the court to which the appeal is taken shall condemn the plaintiff to pay all costs in the court of the first instance, though a judgment may be rendered in the Supreme Court in his favor."

APPEAL from the Commercial Court of New Orleans, *Watts, J.*
MARTIN, J. The plaintiffs claim the rescision of a lease by them given to the defendant, the delivery of the premises, payment of the rent due, and damages. The jurisdiction of the court was excepted to by the defendant on the score of commorancy, and *ratione materieæ*. Both exceptions were overruled; and the defendant answered, admitting the lease of the lot, the execution of his notes for the rent, and averring the payment of the first three notes. He added that afterwards, and before any of the other notes became due, he applied to the Council for a rescision of the lease, offering the surrender of the premises, and consenting to lose the amount of the notes which he had paid. He further urged that he frequently called upon the chairman of the committee to which his application had been referred, and to the member of the council who had presented his petition, without ever being able to learn whether it had been acted upon; that from conversations with the above gentlemen, and the absence of a call for payment of the notes sued on, he was induced to believe that his proposition would be accepted, and consequently took no steps to improve the premises, or dispose of the lease. The court gave judgment, annulling the lease, directing the lot to be restored to the possession of the plaintiffs, and con-

demning the defendant to pay the amount of his notes, with interest from their maturity.* The defendant appealed.

By the act establishing the Commercial Court, it is provided that none of its judgments shall be void for want of jurisdiction, and that if on a plea to its jurisdiction being overruled, this court should determine that it was not properly so, the plaintiff shall be condemned to pay all the costs below, although the judgment of this court be in his favor. B. and C's Digest, page 235, no. 4. We are, therefore, to inquire, in the first place, whether the judgment appealed from is to be reversed or affirmed; for if it be reversed, it will be unnecessary to examine whether the exception was improperly overruled or not, as, in either case, the plaintiff will have to pay the costs.

On the merits, judgment was properly rendered for the plaintiffs. By the contract, the lessee was to erect certain buildings within three years. This not being complied with, the Council passed a resolution, extending the time on certain conditions, and declaring that, upon the lessee's failure to comply therewith, the lease should be annulled.

The defendant gave notice of his willingness to have the lease annulled, but claimed to be exempted from the payment of back rents. The first judge was of opinion that the pretension of the defendant rested upon a metaphysical subtlety, which cannot be admitted; that there is no reason why the word "annul" should embrace the past, and not be confined to the future; and that the whole context of the resolution contradicts the construction contended for, as it would be absurd to infer from it that the Municipality intended to exact the back rents from those who complied with the provisions of said resolution, and to relieve therefrom those who did not conform to the same. It does not appear to us that the court erred.

The clause in the act creating the Commercial Court, which we have already cited, is extremely general; and, if we were to hold that it admits of no exception, there would be no judgment of that court which we could reverse for want of jurisdiction.

* The notes were for the sum of \$125 each. The judgment below was for \$500, with interest.

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The difficulty is to discover in what cases exceptions may be made by the judiciary, when the legislator has not made any. *Ubi lex non distinguit, nec nos distinguere debemus.* The exclusive jurisdiction vested in the courts of probate for the settlement of successions, probating of wills, appointment of tutors, curators, &c, would probably authorise us to prevent the interference of the Commercial Court in such cases. The present action, however, is a *mixed* one. The plaintiffs revendicate a lot of theirs leased to the defendant, for the non payment of the rent and a breach of the conditions of the lease. This forms an exception to that part of the Code which requires defendants to be sued in the courts of their domicile. Code of Practice, art. 163. The exception of commorancy was, therefore, properly overruled. But as this demand is in the nature of a petitory, or possessory action, which is excluded from the jurisdiction of the Commercial Court by the act erecting it (B. and C's. Digest, p. 234, no. 3), we are of opinion, that the exception *ratione materie* was incorrectly overruled, and that the costs below must be paid by the plaintiffs.

It is, therefore, ordered and decreed, that the judgment be affirmed; the plaintiffs paying the costs below, and the defendant those of this court.*

Rawle, for the plaintiffs.

Hamner, for the appellant.

**Hamner*, for a re-hearing. It is admitted in the opinion of this court, that the Commercial Court was without jurisdiction; but the appeal has been maintained under the peculiar provisions of the act establishing that court. The unconstitutionality of those provisions was so palpable, so far as they relate to the Supreme Court, that it was not thought necessary to notice it in the points filed. If the court *a qua* was without jurisdiction, it is trifling to say that the case had been tried before it, simply because evidence had been heard and an opinion expressed by the judge. There may have been the *form* of a judgment; but nothing more. It is the authority vested by the sovereign power, which makes all the difference between an *opinion* and a *judgment*, and makes the latter obligatory. The interpretation given by the opinion of this court to the statute creating the Commercial Court, would give the latter tribunal jurisdiction over every man in the State, if caught here and served with process.

Re-hearing refused.

DELANA BALL in her own right, and as Natural Tutrix of her
Minor Children v. WILLIAM L. HODGE and another.

Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, *in solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*.

One who has managed all the business of a succession, under an agreement by which a third person consented to become the security of the plaintiff as administratrix, on the condition of her trusting the sole management of the estate to the former, will be allowed the usual commissions of an administrator, as an offset, *pro tanto*, against any claim by the plaintiff for a sum coming to her, as the widow of the deceased, from the succession.

APPEAL from the District Court of the First District, *Buchanan, J.*

GARLAND, J. Jonathan Ball, the late husband of the plaintiff, and father of the minors, died in May, 1834, leaving a large property, real and personal, and debts to a large amount. Some of the creditors applied for the administration of the estate but the plaintiff insisted upon her legal preference to be appointed administratrix, and the administration was granted to her upon condition of her giving surety. She found some difficulty in obtaining sufficient surety, but, finally, the defendant, A. Hodge, agreed to become surety, upon condition that the administratrix would give her power of attorney to William L. Hodge, his brother, and co-defendant, to manage all the affairs of the succession in her name. This condition she assented to, and, in the month of February, 1835, a power of attorney was made before a notary, in which full powers were conferred on W. L. Hodge to manage all the business; but to his act, Andrew Hodge was not a party. W. L. Hodge continued to manage the estate for several years; collected large sums of money; and paid off the debts. He rendered to the Probate Court, in the name of Mrs. Ball, various accounts and *tableaux* of debts, by the last of which, there appeared to be a balance in her hands of \$14,694, but which was in fact in the hands of her agent; all the debts of the estate having been, apparently, paid, except a

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few demands in contestation in court. It is to recover this sum, and a further one of \$2,951 as her legal commissions as administratrix, which she says W. L. Hodge received, that this suit is instituted. The answer of W. L. Hodge is a general denial, and a plea of compensation for payments made after the rendition of the last account, which, he says, greatly reduce the demand. The answer of Andrew Hodge is, that he agreed to become the surety of plaintiff on her administration bond; but that he had nothing to do with the acts of W. L. Hodge as her agent, for whom he is in no manner responsible. He denies that he ever acted as agent of the plaintiff, and opposes a general denial to all the allegations in the petition.

On the trial it was proved by a witness who acted as the counsel of the parties, "that W. L. Hodge was to have the whole management, in consideration of Andrew Hodge going security for Mrs. Ball."

The court below held Andrew Hodge responsible, *in solido*, for the agency of his brother, and gave a judgment against them for \$9,509 33, with legal interest, from which the former has appealed.

The first question that arises in the case, is as to the responsibility of Andrew Hodge. As towards the heirs of Ball and his creditors, there is no question as to his liability, as surety on the bond; and it is to be remembered, that the heirs are parties to this suit, and that the debts of the estate having been paid, the creditors have no interest in the question. Therefore, as to one half of what may be found due, he is responsible. Let us then see how it is in relation to the other half, which it is to be presumed belongs to Mrs. Ball, as a partner in the community. From the evidence in the case it is clear, that Mrs. Ball was but a nominal administratrix, and that W. L. Hodge was the actual administrator of the estate; and this resulted from the condition imposed by Andrew Hodge, when he agreed to sign the bond. It is fair to presume, that prudential and proper motives induced the condition; but it was in effect saying to Mrs. Ball, in your skill, fidelity and capacity I have no confidence; but if you will let a person in whom I have confidence, and will name, manage all the affairs of the succession, I will sign the bond. The

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clear inference from this is, I will not be responsible for you, but I will for the person named. Domat, book I. tit. 15, § 1, art. 13, tells us "that, if a person engages one in some loss that may be imputed to him, as if he should persuade one to lend money to an unknown person," and it is lent on the assurance that the borrower will repay it, then the person recommending the borrower, is bound to make it good; and the case of *Amory &c. v. Boyd*, 5 Mart. 414, was decided by this court on that principle. See also 9 Mart. 385. The defendants contend that, according to art. 3008 of the Code, suretyship cannot be presumed. This we admit: but in this case we think it is apparent that Andrew Hodge considered his suretyship for Mrs. Ball as merely nominal. His brother was the actor in the business, and he intended that he should be so when he signed the bond. We are, therefore, of opinion, that the court did not err in holding the appellant responsible.

The next question is as to the amount owing. As to the question about the commissions, we think that, under the circumstances of the case, the judge did not err in allowing them. W. L. Hodge, after the time of his appointment as attorney in fact, was the real administrator of the succession, and it is upon that ground alone that Andrew Hodge can be held responsible for his acts. All the other questions are matters of account entirely; and, after the best examination we have been able to give them, we see but one error that requires correction; and that is as to the refusal of the judge to allow a credit for \$1,722 52, money received and retained by W. J. Barney, the brother and agent of the plaintiff, previously to the appointment of W. L. Hodge as the attorney in fact of the plaintiff, which was in February, 1835. Previously to that date, it does not appear that he had any thing to do with the estate; and, of course, he cannot be responsible for the acts of the plaintiff, or her brother, who it is proved was actively engaged in managing the affairs of the succession.

As to the items of \$110 and \$343 41, we see no vouchers for them; and the fact of their being mentioned in a *tableau* presented to the Probate Court, leaving the sums blank, does not dispense with the production of some proof of payment.

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As to the other items, it is somewhat difficult to pass on them properly, in consequence of the general manner in which the accounts are stated. If a detailed account of receipts and payments had been made out, it would have been easy to detect any errors in it; but as the receipts and payments are stated, we cannot say that the judge, who had the parties before him to explain all the accounts, erred in any other respect than as before mentioned.

It is, therefore, ordered and decreed, that the judgment in favor of the plaintiff be reduced, and credited with the sum of seventeen hundred and twenty two dollars and fifty two cents, to take effect on the 4th of November, 1839; and be affirmed for the sum of seven thousand seven hundred and eighty six dollars and eighty one cents, with interest thereon at the rate of five per cent per annum from the date aforesaid. The plaintiff and appellee paying the costs of this appeal; the costs in the court below to be paid by the defendants.*

Preston, for the plaintiff.

Roselius and *Eustis*, for the appellant.

* *Roselius* and *Eustis*, in a petition for a re-hearing, urged that Andrew Hodge, by becoming surety for Wm. L. Hodge, made himself responsible for the acts of the latter, so far as the creditors and heirs of the deceased were concerned; but not towards Mrs. Ball, for the acts of her own agent. The mere fact that Andrew Hodge, when requested to become her surety as administratrix, consented to do so on the condition that Wm. L. Hodge should act as the agent of the administratrix, cannot change the whole character of the obligation he contracted. Mrs. Ball was perfectly free to accept or reject the condition; and Andrew Hodge had a right to impose any terms he thought proper, not illegal or immoral, as the condition on which he would become surety. Suretyship is an accessory, and can never exceed the principal obligation; in the decision rendered in this case, this rule has been entirely lost sight of.

Preston, in answer to the petition for a re-hearing. Mrs. Ball gave a power of attorney to William L. Hodge, and, in his absence, to Andrew Hodge. They were each equally cognisant of her business. Mrs. Ball was appointed administratrix of her husband's estate, on giving Andrew Hodge as her surety. He became the surety on the condition alone that the above power of attorney should be given, and that Wm. L. Hodge should have the whole management of the estate. Andrew Hodge also required that Mr. Pierce should be the lawyer of the estate. Thus as surety he was to control every thing.

Mrs. Ball, as administratrix, obtained judgment against Andrew Hodge and one Barney the 11th March, 1836, for \$28,000 with interest. Wm. L. Hodge acknowledged, on record, satisfaction of this judgment from Andrew Hodge, and by notarial act, on the

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THE STATE v. THE JUDGE OF THE CITY COURT OF NEW ORLEANS.

The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

RULE to show cause why a *mandamus* should not be issued to the Judge of the City Court of New Orleans.

McHenry, for the rule.

Collens, judge of the City Court, *contrâ*.

SIMON, J. The applicants complain that, having instituted a suit in the City Court of New Orleans, against one J. P. Stanby, to recover the possession of a certain tenement which they had leased to Messrs. Schmidt & Stanby for a store, the lease of which had expired, and having obtained judgment against said Stanby, by which the latter was ordered to surrender to them

16th of July, 1836, transferred the judgment to Andrew Hodge. Pierce, who was the attorney of the Hodges, states that no money *was paid*; that he entered satisfaction because he was directed to do so by Wm. L. Hodge. Andrew Hodge did not satisfy the judgment; but satisfaction was acknowledged, and a transfer made to prevent a judicial mortgage against him, and to enable him to act by subrogation against Barney. No such sum was deposited in the Bank of Orleans where the funds of the estate were deposited. The judgment was shown to be unpaid by the account filed by Wm. L. Hodge. The district judge gave judgment for the plaintiff, on the ground that Andrew Hodge was responsible under his bond, both Wm. L. Hodge, and the attorney of the estate, having been appointed by him, and being under his control.

The conclusion of the judge would be wrong, if the transaction for which the plaintiff seeks redress, was between Wm. L. Hodge and a third person; but it is for a transaction between William L. Hodge and Andrew Hodge. The latter knew that Mrs. Ball had given Wm. L. Hodge no authority to discharge him from a large judgment, without payment. His liability, in this view of the case, results from his combination with Wm. L. Hodge to wrong her and her children. Andrew Hodge is bound to pay the balance due of the judgment in favor of Mrs. Ball and her children.

There is far less pretext in this case for giving validity to a fictitious and collusive discharge of a debt, than in the case of *Bienvenu v. Segura*, 19 La. 346, in which this court, instead of acknowledging such a discharge to be valid, gave damages for pretending that it was.

Re-hearing refused.

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the possession of said store, said defendant immediately filed a bond for \$500, and obtained an order allowing him to take a suspensive appeal to this court from said judgment.

They further represent, that they applied to the City Court for a writ of possession, as contemplated by article 2683 of the Civil Code, but that the judge thereof refused to allow said judgment to be executed, or any further proceedings to be had in said case during the pendency of the appeal, although the law that gives jurisdiction to the City Court of cases of this class, expressly declares that the landlord may avail himself of the provisions of said law and of the said article 2683. They refer to the laws relative to the subject in controversy, and say that the refusal of the said judge to allow a writ of possession to issue, amounts to a denial of justice; wherefore they pray that a writ of *mandamus* may be issued, directing said judge to allow a writ of possession, &c.

The judge answered, that he granted the suspensive appeal agreeably to the usual practice of his court; that the interpretation given by his predecessor to the act of 1838, relative to the jurisdiction of the City Court, and to the last section of the act of 10 March, 1826, also relative to said court, was that, in the cases between landlord and tenant, for the possession of the premises leased, the defendants were entitled to a suspensive appeal, &c.

We think the judge did not err, in refusing to permit a writ of possession to issue. It is true that, by the second section of the law of 1819 (B. and C.'s Digest, p. 540, no. 3), it is provided that no appeal from a judgment rendered according to the first section shall suspend its execution; and that the said first section points out the proceedings to be had when a lessor wishes, upon the determination of the lease, to repossess himself of the premises leased, and says that it shall be lawful for the justice of the peace to give his judgment against the lessee, or tenant, ordering him to deliver to the lessor the possession of the demised premises, &c, which judgment, in case of refusal of the lessee to comply with it, is to be executed by the constable's acting under a warrant of possession issued for that purpose. It is also true that articles 2656 and 2683 of the Civil Code seem to be a re-enactment of the provisions contained in the first

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section of the law of 1819, and that this court, so far back as 1833 (6 La. 58), recognised, in several instances, the validity of proceedings had under the said act of 1819. But by the terms of the law of 1838 (B. and C.'s Digest, p. 227, nos. 81 and 82), it is manifest that, with regard to judgments rendered by the City Court in matters of this kind, the first provision contained in the second section of the law of 1819 was virtually repealed; and that an appeal was allowed in cases in which it was previously denied. The fourth section of said law provides that, "*In all actions hereafter instituted by landlords against tenants for the possession of real property, the presiding judge shall have, exclusively of justices of the peace and associate judges of the City Court, original jurisdiction; and the proceedings shall be by petition and answer in writing, as in other cases, where the value in dispute shall exceed the sum of \$300, and either party may appeal from any final judgment rendered in such cases directly to the Supreme Court, &c;*" and the fifth section says, that "*No appeal from any judgment rendered as provided in the preceding section shall suspend execution, unless the appellant give bond, with good and sufficient security, at the discretion of the court, for all such damages as the appellee may sustain; and it shall be lawful for any lessor to make use of the provisions of this act, and of article 2683 of the Civil Code, against any under tenant or lessee that he may find in possession of the premises leased,*" &c.

However different the practice may have been under the law of 1819, and previous to the enactment of the law of 1838, the provisions of the latter are so clear that they need no comment. They were adopted for the purpose of vesting the presiding judge of the City Court with original and exclusive jurisdiction in all actions instituted by landlords against their tenants for the possession of real property, in cases in which the value indispute exceeds the sum of \$300; of requiring the proceedings in such suits to be by petition and answer, so as to form an issue joined between the parties, as in other cases; and of permitting, after judgment thereon, an appeal to be taken therefrom directly to the Supreme Court, on the appellant's filing his bond, with a good and sufficient surety, for an amount to be fixed by the court a

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qua, to secure the payment of all such damage as the appellee may sustain—from what? Evidently from the delay which the appeal may occasion in his resuming the possession of the property. Heretofore, the landlord had an immediate remedy, which no appeal could suspend; now, under the law of 1838, such remedy may be suspended by an appeal; but the appellant is bound to secure to the appellee the payment of any indemnification to which the latter may be entitled in consequence of the delay experienced in the final execution of the judgment rendered in his favor; and the law further provides, that its benefit, as also that of art. 2683 of the Civil Code, shall be extended in favor of any lessor against any under tenant, or lessee, whom he may find in possession of the property leased.

The rule is, therefore, discharged.

ISAAC THOMAS and another, Executors of the last will of Micah Peabody Flint, deceased, v. ELIZABETH CLEMENT and others.

Defendants sold to plaintiff a tract of land, at the rate of ten dollars an *arpent*. The act of sale provided that, "within a reasonable time from the day of sale, a survey and plan of said tract shall be made by a duly commissioned surveyor, which plan shall be recorded and made part of this act," and that in case of plaintiff's eviction from any part of the land, or of its being found by the survey to contain less than the quantity for which he paid, defendants shall refund to the purchaser at the rate of ten dollars for every *arpent* deficient. No survey was made under this stipulation; but by a new survey, made by the United States in consequence of alleged errors in the first, the lines of the tract sold to plaintiff were altered, and a large portion of the land declared to belong to the United States. Plaintiff knew of this second survey and location, which was approved by the Commissioner of the Land Office more than ten years after defendants' sale to him, but he made no opposition to the proceedings, nor notified his vendors. After the land had been declared public, plaintiff purchased it from the United States at \$1 25 per acre, and immediately caused a survey to be made to ascertain the deficiency in the quantity purchased from defendants. In an action by plaintiff against defendants, claiming to be refunded at the rate of ten dollars an *arpent* for the deficiency: *Held*, that the stipulation to refund to the purchaser at that rate, must be confined to any deficiency ascertained by a survey made "within a reasonable time from the day of the sale;" that it was never contemplated to apply to an eviction occurring at a distant period—ten or eleven years after; that for such an eviction the vendee must be compensated for the damage actually sustained; and that the price paid by him to the United States for the land from which he was so evicted, is the measure of such damages.

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To constitute an eviction it is not necessary that the purchaser should be actually dispossessed. It may take place where he continues to hold the property, if under a different title from that transferred to him by his vendor.

APPEAL from the Commercial Court of New Orleans, *Watts, J. L. Janan*, for the appellants.

R. H. Chinn, L. C. Duncan, Wharton and A. Hennen, for the defendants.

GARLAND, J. The plaintiffs claim the sum of two thousand five hundred and forty-five dollars, which they say the defendants owe, in consequence of a certain tract of land sold by the latter to their testator falling short of the quantity stated in the sale. It appears that, on the 5th of February, 1829, the defendants, by an authentic act, sold to M. P. Flint and one Jesse P. Brown, a "tract of land situated in the parish of Rapides, on the bayou Bœuf, measuring about sixteen *arpents* front, by forty *arpents* in depth, containing six hundred and forty superficial *arpents*, more or less," for the price of \$6,400, being at the rate of ten dollars per *arpent*. It was further agreed, "that, within a reasonable time from the day of sale, a survey and plan of said described tract of land, shall be made by a duly commissioned surveyor, which plan shall be recorded, and made a part of the present act;" and, in case the said tract of land shall be found to contain more than six hundred and forty *arpents*, then the said purchasers agree to pay the defendants for such excess, at the rate of ten dollars per superficial *arpent*; and in case they (said purchasers) are evicted of any portion of said land, or, if it shall be found by the survey to contain less than six hundred and forty superficial *arpents*, then, for the quantity so wanting, the defendants agree to pay at the rate of ten dollars the *arpent*, without any recourse on them for improvements. M. P. Flint, at a subsequent period, acquired all the rights of Brown, by purchase from him. This tract of land is a part of a much larger tract in that section of country, confirmed to Miller and Fulton by the United States, generally known as the Indian claims on bayou Bœuf. In the year 1830, these claims were located by Kenneth McCrummen, a deputy surveyor of the United States, and his plat and operations were approved, in February, 1831, by the principal deputy surveyor

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for the district. By this survey, the Miller and Fulton claim had a depth of forty *arpents*, at the place where the tract of land sold by the defendants to Flint and Brown was situated; and they had their full quantity of six hundred and forty *arpents*. Some time after the approval of McCrummen's survey, some persons being dissatisfied with it, raised objections; and we find that, in November, 1835, the Commissioner of the General Land Office, stated in a letter addressed to the Surveyor General in this State, that it could not be recognised, and that a new survey and location must be made. This was made in the years 1834, 1835 and 1836, by the Messrs. Phelps, also United States surveyors. In the latter year a plat of their operations was submitted to the Commissioner of the General Land Office, who, being satisfied with it, the same was finally approved by the Surveyor General, in the year 1839; and, a short time thereafter, a patent was issued by the President of the United States for the land, conformably to this survey, being about ten years and two months after the sale from the defendants to the plaintiff's testator. By this survey, at the place where the land sold was situated, the claim of Miller and Fulton had a depth of much less than forty *arpents*. The plaintiffs had a survey made in 1840, more than eleven years after the purchase by their testator, by Phelps, the parish surveyor, by which it appears there are but 385 50-100 superficial *arpents* in the tract, extending the side lines to the back line last fixed by the United States, being a deficiency of two hundred and fifty-four and a half *arpents*, for which the sum of ten dollars per *arpent* is demanded.

When the location and survey of the Miller and Fulton claims were made and approved, in 1831, neither M. P. Flint, nor his associate, Brown, took any steps to have a survey made, to ascertain if there were 640 *arpents* or more in the tract purchased by them. Had they had a survey made then, at least six hundred and forty *arpents* would have been found within the limits of the land purchased by Henry Clement, and sold by his heirs to Flint and Brown. When dissatisfaction was expressed with McCrummen's survey, and steps were taken to set it aside, no objection was made by Flint and Brown; they took no measures to arrest the Messrs. Phelps in making a new location and sur-

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vey; nor did they notify the defendants of any of those proceedings, nor join with others who were interested in opposing them, although they were well calculated to affect their title and possession to the land purchased. It does not appear that M. P. Flint, in his lifetime, nor the plaintiffs since his death, ever took any steps to put the defendants on their guard, or to inform them of the probability of an eviction for any portion of the land. They were silent until the survey of the Messrs. Phelps was approved in 1839, whereby it appears that the lines of the Miller and Fulton claim were changed and contracted, and the land formerly within them declared to be public. Then the plaintiffs, still keeping the defendants in ignorance of the eviction, went to the Land Office at Opelousas, and purchased from the United States the same land at one dollar and twenty five cents per acre; and afterwards, without notice to the defendants, more than eleven years after the original contract; they have a survey made, *ex parte*, showing a deficiency of 254 50-100 *arpents*, and claim of the defendants, at the rate of ten dollars per *arpent*, for it, when they had themselves bought it at \$1 25 per acre.

The Commercial Court gave a judgment in favor of the plaintiffs for \$287 50, the amount they had to pay the United States for the land; and they have appealed.

It is clear that if Flint and Brown, at any time within five years after their contract with the defendants, had had the land surveyed, that the quantity sold would have been found within the limits of the Miller and Fulton claim, as that was always, until the survey made by Phelps, represented and held as having a depth of forty *arpents*. There is no deficiency in the front pretended. And it is very probable that, had the plaintiffs given the defendants notice of the proceedings of the surveying department, which resulted in what they call an eviction, they would have taken some measures to prevent it; or would, at least, after the eviction, have endeavored to purchase the land of which the plaintiffs had been evicted, and, in that way, have secured to them the quantity originally sold. To prevent this, the plaintiffs did not give any notice at all, until, by their own acts, they had made it impossible for the defendants to give them the quantity stipulated to be sold.

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The counsel for the plaintiffs contends, that his clients have been evicted, in consequence of the alterations made in the location and survey of the Indian claims, and of the issuing of a patent by the United States, in conformity with that survey. That the questions of boundary and location were under the control of the officers of the United States, until the patent was issued, and could be altered by them. This, to a certain extent, is true, and their action and decisions in some cases, will, no doubt, amount to an eviction; but it does not always follow that, in consequence of such an eviction, the vendor or warrantor, must necessarily pay a high rate of damages. He says there has been an eviction in the sense of the terms of the contract, and that the measure of damages has been fixed by it. We think the counsel does not state the contract in the sense intended by the parties. It does not say that if, at any future period, however remote, the plaintiffs should be evicted by a superior title, or a want of one in the vendors, the defendants are to pay them at the rate of ten dollars per *arpent*; but it stipulates that, if, within in a reasonable period, the plaintiffs shall, by a survey legally made, ascertain that there is not six hundred and forty *arpents* in the tract, then a proportionable part of the price to be paid shall be returned; but this does not apply to an eviction that may occur at a distant period, which is covered by the general warranty, and is to be compensated by such damages as may have been sustained. When there is a special clause as to warranty, it must be understood and executed in the sense the parties intended. In this case, we do not think that the terms used, warrant a belief, that if, at any future time, the plaintiffs, or their testator, should be evicted, that a sum of ten dollars per acre was, under all circumstances, to be paid.

The counsel for the defendants contend that there has been no eviction at all, and that judicial action was necessary to effect it. Article 2476 of the Code tells us, that eviction is the loss suffered by the buyer, occasioned by the superior rights or claims of a third person; and it is not necessary that the purchaser should be actually dispossessed, to constitute an eviction. It may take place, where he continues to hold the property, if under a different title from that transferred to him by his ven-

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dor. 1 Robinson 362. Pothier, *Traité de Vente*, no. 96. Trop-
long, *Vente*, no. 415. And in such a case, the vendee may be
entitled to recover. But we cannot believe, that when the par-
ties agreed that a survey should be made, within a reasonable
time, by the plaintiffs' testator, and a deficiency in the quantity
sold (if any) ascertained, they considered ten or eleven years
a reasonable period, or that they intended that such survey
should be made at any indefinite epoch, most advantageous to
the plaintiffs, or their testator. Besides this, the survey pre-
sented is not made and recorded in the manner agreed on. We
are, therefore, of opinion, that the inferior court did not err in
deciding that the plaintiffs are not entitled to recover the sum
of \$2,545 50.

We are of opinion that the Commercial Court, in decreeing
that the plaintiffs should recover of the defendants the sum paid
to the United States for the two hundred and fifty four and
50-100 *arpents*, did substantial justice between the parties. The
plaintiffs have all the land they are entitled to ; and it is just that
upon the defendants' warranty, they should repay whatever sum
it was necessary to quiet the title sold by them.

It is ordered and decreed that the judgment be affirmed, with
costs.

SAME CASE—ON A RE-HEARING.

Prescription runs against a vendee's action of warranty from the date of the eviction,
and not from that of the sale.

Where a party excepts to the jurisdiction of the court, but proceeds to trial without
asking for judgment on his exception, it will be presumed to have been waived.

The counsel of the defendants prayed for a re-hearing.

GARLAND, J. The widow and heirs of Henry Clement have
asked for a re-hearing in this case, on the grounds :

First. That they should have been entirely discharged on their
plea of prescription of ten years, which it is said the court did not
notice.

Secondly. That they should have had judgment against Wil-
liam Miller, their warrantor ; and that that part of the judg-
ment discharging him should not have been affirmed.

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Upon the first ground, we see no reason to change our previous opinion. The plea of prescription does not protect the defendants, as neither ten, nor five years had elapsed from the time they became responsible on their contract of warranty. The plaintiffs were not evicted until the United States, by the operation and approval of Phelps' survey and sale of the land, put them out of possession. The obligation to pay did not arise until the eviction; and, as a consequence, prescription did not run until the plaintiffs had a right to set up a demand of payment.

Upon further examination and reflection, we are of opinion that the defendants should recover of William Miller, their warrantor, the sum they are condemned to pay to the plaintiffs. Miller sold the land to Henry Clement, it being part of a tract of 3,120 *arpents*; the price was \$3,900. The stipulation of warranty is that, if Clement should be evicted by a better title, then Miller, his heirs, &c, bind themselves to refund to Clement, his heirs or assigns, the said sum of \$3,900, and no more. Miller is a non resident. A curator *ad hoc* was appointed to represent him, who notified him of the call in warranty, and of his appointment, and pleaded the general issue. Subsequently Miller appeared by his counsel, and averred that, the court had no jurisdiction over him, as he did not reside in the State; and, further, that the court had no jurisdiction over the subject matter, as the land was in the parish of Rapides. A general denial of all the allegations was also filed. The court below took no notice of the exceptions, but decided that the demand in warranty should be dismissed, although a judgment was given for the plaintiffs, against the heirs of Miller's vendee, for \$287 50.

In this part of the judgment, we think, there is error. No judgment having been asked for by Miller's counsel, on his exceptions, and he having proceeded to trial, we must presume he waived them. It, therefore, only remains to inquire, whether or not Clement, or his vendees, have been evicted? It has been shown that they were, in the first judgment pronounced in this case, and Miller, as warrantor, is responsible for the amount they have to pay as an indemnity to the plaintiffs. The price at which Miller sold the land to Clement, is but little different from that the plaintiffs gave the United States for it.

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It is ordered and decreed, that so much of the judgment of the Commercial Court, as dismisses the demand in warranty of the defendants against William Miller, be annulled and reversed; and it is ordered that Elizabeth Wood, widow of Henry Clement, do recover of William Miller, the sum of two hundred and fifteen dollars sixty two and a half cents, with interest at five per cent per annum from the 16th January, 1841, until paid; that Mary Clement, wife of Charles A. Luzenburg, also recover the sum of \$35 93, with the like interest; and that the legal representatives of Eliza Ann Clement, late wife of Benjamin Story, also recover of said Miller, the sum of \$35 93, with like interest; and, further, that said William Miller pay the costs of the suit and of this appeal.

ROBERT PERRY and another v. THE COMMISSIONERS FOR THE LIQUIDATION OF THE CLINTON AND PORT HUDSON RAIL ROAD COMPANY.

Action by certain creditors of a company against the commissioners appointed for the liquidation of its affairs, claiming a privilege on its property, and praying that it may be sold for the payment of their debts. It appeared from different acts of the Legislature, that the State claimed a privilege on the property of the company, and to have subsequently become, by a forfeiture, declared by an act of the Legislature, the actual owners of the property, which act directed the treasurer of the State to sell the same. No citation or other notice of the proceedings was given to the governor, treasurer, attorney general, or district attorney, but judgment was rendered declaring the act pronouncing the forfeiture unconstitutional, the State not to be the owner of the property, and ordering it to be sold by the commissioners, reserving, for a future decision, the question of the privileges of the different creditors. On appeal: *Held*, that the State not having been cited, nor notified of the proceedings, the judgment must be reversed, and the case remanded for a new trial, after the State shall have been notified through the proper officers.

APPEAL from the District Court of East Feliciana, *Johnson, J. A. M. Dunn*, for the plaintiffs.

***Muse and Merrick*, for the appellants.**

GARLAND, J. A reference to 2 Robinson, 218, will show the original character of this case, and the grounds upon which the claim is based. After the cause was remanded for a new trial, and before it came on for trial, proceedings were instituted (un-

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der the provisions of an act of the Legislature, entitled "An act to preserve the credit of the State," approved March 26th, 1842—Acts 1842, p. 460, § 2) by the State against the Clinton and Port Hudson Rail Road Company, for the purpose of having its charter forfeited, which was decreed, and the judgment was affirmed in this court—2 Robinson, 307; 4 Robinson, 445. The defendants, Saunders and Fluker, were appointed commissioners, for the purpose of liquidating the affairs of the company, and entered upon the discharge of their duties. In the course of the year 1843, these commissioners entered into a compromise with the plaintiffs, by which the amount to be paid them was settled, and a compensation of a certain amount arranged. It was also agreed that the compromise should "not in any way deprive the plaintiffs aforesaid of their mortgage and privilege as contractors for the construction of the Clinton and Port Hudson Rail Road, until the debt due them is finally paid, or a release hereafter made by them." This compromise was homologated, and made the judgment of the District Court; and, on an appeal, affirmed by this court. See 7 Robinson.

In March, 1839, an act was passed by a constitutional majority of both branches of the Legislature, entitled "An act to expedite the construction of the Clinton and Port Hudson Rail Road," by which the State agreed to loan the company its bonds for \$500,000, payable in ten, twenty, and thirty years, bearing interest at the rate of five per centum per annum, upon condition, that "the company shall bind itself to pay the principal and interest of the bonds" to be issued and loaned. To secure the payment of these bonds and interest, it was enacted that the company shall mortgage, or hypothecate, in favor of the State, the capital stock of the same, together with all the property, moveable and immovable, and slaves belonging to the same; and shall also subrogate the State to all the mortgages which may have been executed in favor of the institution by each individual stockholder, both under the original and amended charter. And it was further enacted, "that in case said bonds and the interest thereon are not punctually paid, according to the provisions of this act, *the rail road constructed by said company* shall, by the mere failure so to pay said bonds

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and the interest thereon, *and the payment thereof by the State*, become the property of the State; and the said company shall still be bound to pay the principal and interest of said bonds; and the said rail road shall revert back to said company on the payment of the bonds, if paid within five years after maturity;" and the State may take such other steps as may be necessary to its indemnity, in case the company shall not pay the bonds and interest. See acts of 1839, pp. 214, 216, ss. 2, 4. In the month of June, 1839, an attorney in fact of the Rail Road Company appeared before a notary public in New Orleans, to execute the pledge, or hypothecation, required by the act of the Legislature; and in the authentic act then passed is recited and stated what the Legislature had proposed, and that three-fourths in number and amount of the stock holders of the company had accepted the propositions, and had, in the act of acceptance, given to the board of directors "the power to comply with all the requisitions of said act of the Legislature, and, among others, *to pledge* to the State of Louisiana the capital stock of said company, together with all the property, moveable and immovable, and slaves belonging to the same, and to subrogate the said State of Louisiana to all mortgages which may have been executed in favor of said institution, by each individual stock holder, both under the original and amended charter; being seven hundred and fifty thousand dollars in amount, as the whole is set forth in the second section of the said legislative act." The foregoing is the authority conferred on the directors by the stock holders. We will now state what the agent of the directors, and the officers of the State, did. The act proceeds: "Now, therefore, for the purpose of accomplishing the object or objects contemplated by the aforesaid legislative act, and especially for the purpose of obtaining the bonds of the State of Louisiana, signed by the governor of this State, and counter signed by the treasurer thereof, to the amount of five hundred thousand dollars, as provided for in the third section of said legislative act, he, the said James H. Muse, in his aforesaid capacity, does hereby, for and in the name and in behalf of the Clinton and Port Hudson Rail Road Company, and for and in the name of the President and Directors of said Com-

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pany, by virtue of the authorisation in him vested as aforesaid, specially pledge to the State of Louisiana, the capital stock of the said Clinton and Port Hudson Rail Road Company, together with all the property, moveable and immovable, and slaves, now belonging thereto, *or which in future shall or may belong thereto*; hereby pledging to the said State the rail road belonging to said company as far as the same is now constructed, and the whole extent of the same when fully completed; and also the whole of the land upon which the said rail road is constructed, and will be found to be constructed when finished; and likewise all and every matter, thing, property and appurtenance thereto attached, and thereunto belonging, or in any wise appertaining." The act then proceeds to subrogate the State to the mortgages executed by the stock holders, describing them. It contains other stipulations not now necessary to state.

In the month of March, 1841, the interest on the bonds loaned by the State not having been paid, the Legislature passed an act entitled "An act to protect the credit of the State," in the preamble to which, a brief statement is made of their transactions with the Clinton and Port Hudson Rail Road Company; and it is said that "a portion of the first instalment of the interest on said bonds is past due and unpaid, and the company is unable to pay the same;" it is therefore enacted, that the state treasurer pay such portion of the interest on said bonds as may remain due; and also, "that by virtue of the second and fourth sections of the act aforesaid, the said road, *with all the machinery, fixtures, slaves and appurtenances thereunto belonging, or in any wise appertaining*, be, and they are hereby declared to be forfeited to the State," reserving to the company the right of redeeming the same in five years. Other provisions are made in relation to the disposition of the revenues, any excess of which over the expenses, is to be applied to the interest of the bonds; and, finally, the corporation is made the agent of the State, for the purpose of administering the affairs of the company, so long as the State "shall retain the ownership, or control of the premises." Acts of 1841, pp. 74, 75, ss. 1, 2.

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In 1842-3, by the proceedings before stated, the charter of the company was forfeited, and the defendants were appointed commissioners. In the month of March, 1844, the Legislature, without repealing the law of 1842, or abolishing the office of commissioners under it, passed an act directing the treasurer of the State to take the rail road, engines, fixtures and other things belonging to it, together with certain lots, lands, slaves and other property, out of the hands of the commissioners, and to sell the whole in mass, on a credit of six, twelve, eighteen and twenty-four months, the price to be secured by endorsed notes, or discharged in the obligations of the State.

In September, 1844, no motion having yet been made to sell the property in the hands of the commissioners to pay the debts, the plaintiffs presented their petition, setting forth their original contract with the company to construct a part of the rail road; also the institution of a suit to recover the amount owing to them, the forfeiture of the charter of the corporation, their compromise with the commissioners, and its homologation by the court, and its being made the basis of a judicial decree. They allege that they have requested the said commissioners to pay them their debt, but in vain; that they have requested them to sell the property and rail road in their possession, but that they have refused to do so, alleging that said rail road belongs to the State, having been forfeited by an act of the Legislature, and that the state treasurer has, by law, been directed to sell said rail road, and to place the proceeds of the sale in the treasury. The petitioners then allege, that said act of the Legislature declaring the rail road, and other property to be forfeited, is null and void, inoperative and unconstitutional, as is also the act taking away from the commissioners the property, and ordering it to be sold by the treasurer; that the act declaring the road to have been forfeited is unilateral, made without the consent of the corporation, and not in the ordinary course of law. They further insist that, if the act declaring the rail road forfeited, has vested any title in the State, that then they have a higher privilege than the State, and have a right to cause the road to be sold to pay their debt. That the commissioners are alone authorised to administer the affairs of the aforesaid corpo-

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ration, to sell the rail road and other property, and to distribute the proceeds of the sale under the order of the court, according to the rank and privilege of its creditors.

The petitioners pray that the commissioners be ordered to pay them their debt, amounting to upwards of twenty thousand dollars, with interest at ten per cent per annum, according to their judgment, or that they be ordered to sell according to law the Port Hudson and Clinton Rail Road, and apply so much of the proceeds thereof, as shall be sufficient to satisfy their debt, with interest.

The commissioners, for answer, deny generally the allegations of the petition, and aver that the State claims a superior right, both of privilege and ownership, over said rail road, against all persons whatsoever, by virtue of several acts of the Legislature, and by the act of mortgage and pledge executed by said rail road company in the year 1839, and recorded prior to the act of mortgage and privilege in favor of the petitioners. They further say, that the treasurer of the State has, under the 6th section of the act of the Legislature, approved March 25th, 1844, entitled "An act providing for the adjustment and liquidation of the debts proper of the State, and for other purposes," advertised, among other things, said rail road for sale on the 20th of December, 1844, as will be made to appear by his advertisement annexed; wherefore they pray that the demand of the petitioners be rejected.

On the trial of the case, the petitioners gave in evidence the contract, which, with Boatner and others, they had made with the company, to construct a certain portion of the road. It is an authentic act, passed before the act of mortgage in favor of the State, but not recorded until long after that mortgage was. They produced the compromise made with the commissioners, and the judgment rendered thereon, liquidating the amount of their demand, and recognising their privilege as undertakers of the work. They show the appointment of the commissioners, and their refusal to sell the property; also the advertisement of the state treasurer offering the property for sale.

The commissioners produced the act of mortgage given by
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the Clinton and Port Hudson Rail Road Company to the State, in the month of June, 1839; also a suit instituted by that corporation, subsequently to the act of the Legislature of 1841, declaring the rail road and other property forfeited, in which it is alleged that the corporation is the agent of the State, which is the owner of all the property, and an injunction is asked on that ground to arrest certain creditors, who were proceeding under executions to seize the property, as belonging to the corporation.

Neither the Governor of the State, the treasurer, the attorney general, nor the attorney for the district was notified of any of these proceedings, so far as the record informs us. The commissioners alone were before the court, which decided that the forfeiture declared by the act of 1841 was of no effect, and that the commissioners, by virtue of their appointment, acquired a right to administer the property; that the rail road and all the other property and effects, are legally in their possession, and that no subsequent legislation can deprive them of that right; and that they are the representatives of the State, and of all the creditors. As to the question of priority of privilege, the judge said it was not necessary to decide it then, yet he intimates an opinion favorable to the petitioners, but postpones a final decree until a tableau of distribution shall be filed. It was, therefore, adjudged, that the commissioners proceed to sell, at auction, after thirty days notice, the Clinton and Port Hudson Rail Road, and, as soon thereafter as practicable, to file a tableau distributing the proceeds of the sale according to law. From this judgment the defendants have appealed.

The statement of the facts shows the State to be a creditor of the Clinton and Port Hudson Rail Road Company, for more than half a million of dollars; to secure the payment of which debt, it not only claims to have a mortgage and privilege superior to all others, but claims to be the actual owner of the rail road, on which the plaintiffs allege that they have a privilege, and by virtue of which they claim to have it sold and their debt paid. The constitutional validity of different acts of the Legislature is assailed, and an interpretation of them invoked, unfavorable to the interests of the State; yet neither that officer whose duty it is "to take care that the laws be faithfully execu-

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ted," nor he who takes care of its fiscal interests and relations, nor he who is the advocate of its legal rights, is notified of the proceedings; and a judgment is rendered, in effect annulling two acts of the Legislature, and declaring the State not to be the owner of property it claims to hold as such, and ordering it to be sold by the commissioners of a bankrupt corporation, when the Legislature has ordered it be sold by the treasurer, without a single state officer having been cited.

It is contended, and so decided by the court below, that the commissioners are the representatives of the State, and of all the creditors of the company; this is to a certain extent true, but it does not prove, when the interests of two creditors come in collision, that one of them may withdraw temporarily the authority from the common representative, so far as he is concerned, and then attack his adversary through the agent, without notice, and thus obtain a judgment greatly advantageous to himself, and injurious to his opponent. In the case of *Saul v. His Creditors* (7 Mart. N. S. 447), it was held that when there is a contest between creditors, as to the manner in which property is to be sold, the syndics cannot interfere, nor do any act by which the rights of one party may be weakened or strengthened. 3 Martin, 278. From a petition in the record not served, we find that there are many other creditors of this corporation ready to contest the claims of the State, and if we should decide that they can do so, without notice to the constitutional and legal officers of the State, it might soon be stripped of all its rights, and left remediless.

It is easy to see that many questions are to arise in the liquidation of the affairs of this corporation, the most prominent of which are:

1. What authority the Legislature of the State has, to declare the property of an individual or corporation forfeited, and to become vested in the State, either *ex delicto*, or *ex contractu*, by a mere legislative declaration, without judicial interposition.
2. What rights the State has upon the property, acquired by the corporation subsequently to the mortgage given in 1839, in consequence of a clause being inserted that future property shall be affected by the hypothecation, when the act of the

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Legislature did not require the insertion of such a clause, and the stock holders did not authorise it, so far as the evidence now discloses the facts.

3. What rights the State acquired by the act of forfeiture, and taking possession of all the property of the rail road company with its tacit consent; and further, what responsibilities it has incurred by assuming the control of its affairs, and making the company its agent.

4. Whether the petitioners have not lost their privilege as undertakers entirely, by not recording their contract in time; and whether or not, the mortgage they possibly have, is not inferior to that in favor of the State.

5. In case the rail road and appurtenances, and other property be sold by the commissioners, in what manner and proportion the proceeds are to be distributed among the creditors.

Doubtless other questions will arise, but with those we see before us, it is best to have the interested parties cited in some manner, and we must remand the case for that purpose, and for a new trial, when all interested in the questions shall have been notified.

It is ordered and decreed that the judgment of the District Court be annulled and reversed, and that the cause be remanded for a new trial, with directions that the treasurer of the State, the attorney general, and attorney for the State in the parish of East Feliciana, be notified of the proceedings commenced by the plaintiffs, and that they pay the costs of this appeal.

SAME CASE—ON A RE-HEARING.

By an act of 28 March, 1839, for expediting the construction of the Clinton and Port Hudson Rail Road, it was provided (sec. 2,) that certain bonds of the State should be loaned to the company, on condition that it should agree, "in case said bonds, and the interest thereon, are not punctually paid according to the provisions of this act, that the rail road constructed by the company shall, by the mere failure to pay said bonds (or either of them, s. 4,) and the interest thereon, and the payment thereof by the State, become the property of the State." An act of March 8, 1841 after reciting that the bonds so loaned had been sold by the company, and that a portion of the first instalment of interest on said bonds is due and unpaid, and that the company is unable to pay the same, directs (s. 1,) the treasurer of the State to pay the interest

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so due; and declares, (s. 2,) "by virtue of the second and fourth sections of the act of 1839, the said road, with all the machinery, fixtures, slaves and appurtenances thereunto belonging or appertaining, to be forfeited to the State." *Held*, that so much of the act of March 8, 1841, as declares the road, with the machinery, fixtures and slaves, forfeited to the State, is unconstitutional, and confers no right whatever on the State; and that the question whether there has been a forfeiture or not, is one for judicial enquiry and decision.

The powers and duties of the commissioners appointed by the Governor to liquidate the affairs of the Clinton and Port Hudson Rail Road Company, under the act of 26 March, 1842, ch. 159, are defined by the second section of the act, which declares that the liquidation of its affairs shall be conducted according to the provisions of the act, "to provide for the liquidation of banks," of 14th March, 1842, ch. 98.

So much of the sixth section of the act of 25 March, 1844, ch. 83, as directs the treasurer of the State to sell the property, privileges and immunities of the Clinton and Port Hudson Rail Road Company, was enacted under the erroneous impression that the property and privileges of the Company were legally vested, by forfeiture, in the State. The Legislature had no power to direct the sale of the property.

THIS case was re-heard under the circumstances stated in the opinion delivered by,

GARLAND, J. When this case was before us last, (*ante* p. 404 *et seq.*) we stated the facts very fully, and suggested some of the questions likely to arise out of it. We then remanded the cause to have the state officers made parties, and the questions involved decided contradictorily with them, the State having a deep interest in those questions. When this judgment was rendered, the attorney general came into court, and entered an appearance, as taking a part in the appeal; and all parties agreed that our former judgment, remanding the cause, should be set aside, and that this court should consider all the questions proper to be decided in the present state of the case.

In conformity with this understanding, we have again turned our attention to the facts, and the legal questions presented by them, and are of opinion that it will not be proper for us to decide more than three questions. The first is, what power or authority the Legislature of the State had to declare, by legislative enactment, the property of the Clinton and Port Hudson Rail Road Company forfeited, and to be vested thereby in the State? Secondly, what right the commissioners became vested with by the State's forfeiting the charter of the company, and appointing commissioners to liquidate its affairs? And thirdly, what authority the Legislature had, after placing the property of

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the corporation in the hands of the commissioners, to take away a part of it, and to direct it to be sold by the treasurer, for the sole benefit of the State ?

1. The government of this State is divided into three distinct departments, each separate from, and independent of the other in its action. To the legislative department is entrusted the power of making the laws, and providing for the common benefit and general welfare of the people. That department can make laws and repeal them ; but, in doing so, it cannot take from a citizen the rights he may have acquired under a particular law ; nor can it assume the duties and power of the judicial department, and decree or adjudge how the law shall be administered in relation to a particular right. It can say, for what breaches of its enactments, or for what omissions of duties imposed, fines and forfeitures shall be incurred ; but it has no right to try a case, on an allegation of a breach of what the law requires, or of the non-performance of an obligation or contract, and to decide the case in favor of the State, or against it, and then execute its own decree. The duty of interpreting the laws made by the Legislature, belongs to the judicial department ; and it is that alone which has authority to examine and decide when a civil or penal obligation has been violated or disregarded, and to give the judgment necessary in the premises, with such orders and process as may be necessary to give the decree force and effect. It declares in what cases a fine shall be imposed, or a forfeiture incurred ; and the Legislature has no right, after it has said that an infraction of a particular obligation shall be followed as a penalty by a forfeiture, subsequently to try the case, decide it, and execute its decree.

To have a forfeiture declared, there must be an investigation and examination, whether there has been a violation of law, or of a conventional agreement. The laws of the State say that, for certain infractions of them, a forfeiture of goods shall follow (B. and C's. Dig. pp. 455, 457) ; yet, we suppose, it would shock the common understanding of every man in the community, if the Legislature were, by enactment, to decree that a forfeiture had been incurred, and at once take possession of the property.

By the common law, where lands are forfeited for the person-

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al offence of the party, no title vests in the sovereign until the offence is ascertained by conviction and attainder. Before that time the party is entitled to the possession and profits of his lands, and may alienate them, and convey to the purchaser a complete and legal, though defeasible, seizin. 1 Gallison, C. C. R. 26. 7 Cranch, 603. The same doctrine is, in general, true as to forfeitures of goods and chattels; and a forfeiture attached to a thing, conveys no property to the government in the thing, until seizure made or suit brought.

In some of the States of the Union, aliens cannot hold land; and when there is no heir who is a citizen, the real estate is forfeited to the State, as an escheat. But in such cases no title passes to the State until there is an inquisition of office, as the common law authors call it. In the case of *Fairfax' Devisee v. Hunter's Lessee* (7 Cranch, 619), the Supreme Court of the United States said, that, an alien has capacity to take and hold lands until an inquest of office, and until they are seized by the sovereign. The title is not divested until office found. 3 Wheaton, 594. The State of Virginia assumed as a fact, that the lands of Lord Fairfax, within that commonwealth, had escheated to the State, and consequently granted a part of them to Hunter; but the court said, he had no title, as no inquest of office had ever taken place, and the title was not vested in the State. In other States, and in England, this doctrine is well settled, and the "inquest of office" understood. It is an enquiry made by the State's or King's officer, the sheriff, coroner, escheator, *virtute officii*, or by writ sent to them for the purpose, or by commissioners specially appointed. There are various kinds of inquests, among which is the judicial writ *ad inquirendum*, which is to have an enquiry by a jury touching a cause in court. And it is a matter of congratulation with English lawyers and judges, that "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon, or seize any man's possessions upon bare surmises, without the intervention of a jury." Gilb. Hist. Exch. 132.

In this case it was enacted, "that in case said bonds and the interest thereon are not paid punctually, according to the provisions of the act, *the rail road constructed by said company shall,*

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by the mere failure so to pay said bonds, and the interest thereon, *and the payment thereof by the State*, become the property of the State." This enactment requires two things before the right of property vests in the State: first, the failure of the company to pay the bonds and interest; and, secondly, the payment of them by the State; and then the rail road only was to become the property of the State. Acts of 1839, pp. 214, 216, ss. 2, 4. The act of March, 1841, says: "a portion of the first instalment of interest on said bonds is due and unpaid, and the company is unable to pay the same," to wit, the portion unpaid, wherefore "the state treasurer" is directed "to pay such portion of the interest on said bonds as may remain due;" and then it is declared, not only that the *rail road* is forfeited, but that all the "machinery, fixtures, slaves, and appurtenances thereunto belonging, or in any wise appertaining, be declared forfeited also." There is no proof that the company had failed to pay the interest on the bonds. On the contrary, it is admitted that it had paid a portion of it; nor is there any evidence that the State has paid any thing. The treasurer was directed to pay; but whether he has or not is unknown to us. These things were matters for judicial enquiry and decision; and, in assuming to enquire and decide upon them, for the purpose of declaring a forfeiture, we are clearly of opinion that the Legislature exceeded its constitutional authority. We are, therefore, constrained to say, that that portion of the act of the Legislature entitled "An act to protect the credit of the State," approved March 8th, 1841, which declares the Clinton and Port Hudson Rail Road, with all the machinery, fixtures, slaves and appurtenances thereunto belonging, or in any wise appertaining, forfeited to the State, is unconstitutional and void, and gives the State no right or title to the same, other than what rights it may have under the act of 1839, (Acts of that year, pp. 214, 216, ss. 2, 4,) and the act of mortgage and pledge passed in conformity to the same.

The attorney general has argued with much force and ingenuity that, as the corporation consented to the State's taking possession of the property, and agreed to hold it as agent, it was sufficient, and made the forfeiture perfect. This would, perhaps, be true, if no one but the State and the corporation

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were parties; but the State and the corporation cannot by their agreements deprive others of their rights.

The second question is, what rights the commissioners acquired to the rail road and other property belonging to the corporation, by the proceedings for the forfeiture of the charter? The act of the Legislature of the 26th March, 1842, gives the answer. It says, (sec. 2,) "should a forfeiture of the charter of said company be decreed, then and in such case the affairs of said company shall be put into immediate liquidation, and conducted according to the provisions of an act entitled 'An act to provide for the liquidation of banks,' with this single reservation, that the three commissioners of liquidation shall be appointed by the governor." A right was reserved to the State to foreclose the mortgages of the stockholders, according to existing laws. The commissioners therefore have the same rights to the property, and must administer it for the benefit of the creditors, in the same manner as the commissioners of other banks do, when their charters have been forfeited.

Upon the third point, it seems to us that it is enough for us to say, that the sixth section of the act of the Legislature, approved March 25th, 1844, entitled "An act providing for the adjustment and liquidation of the debts proper of the State, and for other purposes," was based upon the assumption that the rail road, machinery, fixtures, slaves, &c, belonged to the State. It having been shown, by our decision upon the first point, that this assumption was without foundation, it follows that the Legislature could not authorise the treasurer to sell it as property belonging to the State.

The parties consenting, it is ordered that the judgment previously rendered herein (*ante* p. 412) be set aside; and we do now order and decree, that the judgment of the District Court, so far as it decrees, that the Clinton and Port Hudson Rail Road, with the machinery, fixtures and appurtenances thereof, and the slaves surrendered, are not the property of the State, but are vested in the commissioners appointed to liquidate the affairs of the corporation in the manner and for the purposes directed by law, be affirmed. And it is further ordered, that this case be remanded to the District Court,

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that the commissioners may proceed under its authority and that of the law, to the sale of the property as ordered, and to the filing of a tableau of distribution, reserving to each and all of the creditors, their respective rights to assert their claims and privileges, and to oppose such as each may think proper, when the tableau or list of debts shall be legally presented and filed; the appellants paying the costs of the appeal.

A. M. Dunn and Roselius, for the plaintiffs.

Muse and Merrick, for the appellants.

Preston, Attorney General, for the State.

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Under no circumstances can a supplemental answer be permitted to be filed, after the evidence has been concluded.

To prove the reversal by the Supreme Court of the United States of a judgment obtained in a Circuit Court, defendants offered in evidence a printed copy of the record of the suit in the Supreme Court certified by the clerk of the Circuit Court, under the seal of his court, to be a true copy of the record and the proceedings of the Circuit Court in the action; and a copy of the mandate of the Supreme Court, reversing the judgment below, and remanding the case for further proceedings, also certified by the clerk of the Circuit Court, under the seal of his court, to be a true copy of the original on file in his office. There was no copy of the judgment of the Supreme Court among the papers offered in evidence. On an exception to the evidence: *Held*, that it was inadmissible, there being no proof that the person who signed as clerk of the Circuit Court was clerk of that court, and the record not being authenticated as required by the act of Congress of 26 May, 1790.

The courts of this State are not bound to know the clerks of the courts of the United States in other States; nor will any greater weight or authority be given to their certificates and official acts, than to those of the clerks of the state courts of such States. Want of jurisdiction, *ratione personæ*, cannot be pleaded by a party who has voluntarily submitted to the jurisdiction of the court.

The law designates who the judicial sequestrator shall be, and the court cannot appoint another, unless by consent of parties. The parties to an action may select their own agents, and confer on them such powers as they think proper; but the court can impose no burdens or restrictions on such agents, not imposed by their principals.

APPEAL from the Commercial Court of New Orleans, *Watts, J. GARLAND, J.* In January, 1842, the United States commenced a suit, by attachment, in the Commercial Court, against the

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Bank of the United States, to recover a very large amount of money. Among other claims which the plaintiffs set up against the defendants, in their supplemental petition, it is alleged, that they had, in an action brought by them against said corporation, in the Circuit Court of the United States, in the third circuit, sitting at Philadelphia, obtained a verdict and judgment against the defendants, for the sum of \$251,243 54, with interest, "as will more fully appear by the annexed duly authenticated transcript of the record in said action made part hereof, and by other evidence, if necessary, to be adduced on the trial of this cause."

During the pendency of the suit, for reasons stated in the case of *Frazier et al. v. Wilcox et al.* (4 Robinson, 521), Frazier and Adams were, by consent of parties, named receivers, to take into possession the assets and property attached, and to collect the same, according to an agreement entered upon the minutes of the court. These persons accepted the agency, and this court, in the case cited, said: "To us it appears, that the plaintiffs" (who were the said Frazier and Adams) "stand in the relation of agents to the United States, the Bank of the United States, and the assignees of the latter, and as such they can sue," &c. In the same opinion this court said, that the capacity of the agents, or receivers, was derived from the assent of the parties, and not from the authority or appointment of the judge of the Commercial Court. 4 Robinson, 525. He had no more authority over them, than the agreement of the parties conferred. Whether the parties interested have ever terminated the agency of the receivers, it is not material now to enquire.

In August, 1842, whilst the case was pending, an agreement was made between the counsel for the plaintiffs and defendants, by which the latter were not "to apply to the court for a continuance, in order to await the decision of the Supreme Court of the United States, upon the writ of error now pending therein between the same parties, from the Pennsylvania Circuit, &c; and in consideration thereof, that the said United States shall, in the event of a reversal of said judgment. enter a *remittitur* for so much of said judgment (if any) obtained by them in this court, as shall give the said defendants the full benefit of

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such reversal." Under this agreement the parties went to trial, and on the production of the record of the case of the United States against the Bank of the United States, and the judgment rendered therein by the Circuit Court of the United States of the third circuit, sitting in Pennsylvania, a sum of \$251,243 54, with legal interest, was allowed the plaintiffs, and contributed largely to the aggregate of the judgment obtained by them. This suit related to the claim of the United States for certain dividends on its stock in the Bank, and a demand, on the part of the latter, for damages on a bill, or bills of exchange, drawn by the order of a late President of the United States on the French government, and protested for non-payment. The case was then in the Supreme Court of the United States on a writ of error taken by the Bank.

In 1843, the present case being then in this court, on an appeal considered suspensive (consequently no execution could issue in favor of the plaintiffs), and the assets attached and in the hands of the agents, or receivers, Frazier and Adams, being in danger of serious damage and loss, in consequence of the course then being pursued by other attaching creditors, it was proposed by Brooks, the attorney of the Bank of the United States, and the assignees or trustees, claiming to be interested in the assets attached herein :

"1. That if there is any agreement in existence, restraining the United States from proceeding by execution on their judgment in New Orleans to sell the assets attached, it shall be considered as abrogated.

"2. If the United States should purchase the assets of the Bank or trustees, through Wm. W. Frazier and Christopher Adams, Jr., such proceeding shall not in any way affect the rights of the United States to proceed, in Philadelphia, or elsewhere, in suits there pending, or to be brought, for the recovery of the debt demanded by the government, nor shall a greater sum be credited than shall be realised from the assets.

"These stipulations not to be considered as a waiver of any rights of the Bank of the United States, or of any of the trustees, further than is herein expressed."

Upon the receipt of this proposition by the Secretary of the

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Treasury, the District Attorney of the United States for the Eastern District of Louisiana, was directed to issue an execution. He produced in court his letter of instructions, and the agreement just stated, also a copy of a letter from the Solicitor of the Treasury to Frazier and Adams, as agents, and asked that a *feri facias* might be issued forthwith, on the judgment rendered, which was ordered: "but on the suggestion of T. Slidell and J. R. Grymes, attorneys appointed for the defendants and attorneys for the intervenors, it is considered that this order shall not be so construed as to signify a recognition by said defendants or intervenors, of the construction given to the agreement between the parties, by the Solicitor of the Treasury, in the letters and documents filed by the District Attorney."

On the 7th June, 1843, the Solicitor of the Treasury wrote to Messrs. Frazier and Adams, that the District Attorney had been instructed to issue an execution on the judgment in favor of the United States against the Bank, and to levy upon the assets of the defendants in his district, subject to levy and sale. He says that the District Attorney is also instructed to sell those assets, and, if they can be sold at fair prices, to make the amount of the debt, interest and costs, in favor of the United States. "But it is apprehended that, owing to the situation of the assets, a fair price in specie cannot be got for them; and that if they were sold, and the United States, by an agent, should not become a bidder, they will be sacrificed for a sum much below their value, and insufficient to pay the debt to the United States. To prevent this, I am authorised by the Secretary of the Treasury to request you to accept the appointment, which is hereby conferred, of agents of the United States, to attend the sale on the execution, and purchase in the assets sold, for the United States.

"Should you accept this appointment, you will bid such sums as will prevent a sacrifice of the assets, taking care, in all cases to keep within reasonable bounds, and exercising in regard to each, the sound discretion which a prudent man would exercise in his own case.

"You will assume the care, management and collection of the assets and choses in action, which you may so purchase, in

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trust for the United States, and convert the same into money as fast as it can be done; and, from time to time, as collections are made, you will pay the same into the Treasury of the United States in payment of their judgment, debt, interest and costs; and if, after satisfying such judgment, and paying the expenses incurred in your agency and in the collection of such assets, a sum of money should remain, that sum shall be paid into court, to be applied and paid by order of the court to such person or persons as may be legally entitled to the same, as if such funds had not been levied on by the United States, and as if no proceedings had been instituted by, and no debt due to the United States.

"The District Attorney is instructed to co-operate with you in the execution of your agency hereby conferred."

This agency was accepted by Frazier and Adams, without any limitation or reserve. Neither the bank, nor the assignees, ever gave them any instructions, nor assumed a right to do so.

In the same letter in which the District Attorney was directed to issue the execution, and was informed of the appointment of Frazier and Adams as agents, the Solicitor of the Treasury sends a copy of the propositions of Brooks, and he gives his views of them. The first stipulation he says, removes all obstacles to issuing the execution. "The second stipulation tendered by the Bank and the trustees, looks to the purchase of these assets by the United States, through the agency of Messrs. Frazier and Adams, should the government see fit to take that course, and direct such purchase by such agents. It involves no agreement on the part of the United States so to proceed, or as to the disposition of the assets should they be purchased.

"The primary object of the government is to collect the debt due; but it considered it but right in doing so, to regard the interests of others, so far as to occasion as little injury to them as practicable."

The Solicitor then proceeds to recapitulate his instructions to the agents, and directs the District Attorney to co-operate with them. He concludes: "this arrangement is voluntarily made by the Secretary of the Treasury, who desires only the payment of the debt due to the United States; and who unites with me in

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considering it most consistent with equity and justice to all parties concerned."

Under the agreement and instructions stated, the sheriff of the Commercial Court, on the — day of July, 1843, proceeded to sell under the execution in favor of the United States, a very large amount of assets, consisting of judgments, notes, mortgages, bills, &c. The agents of the United States purchased assets to the amount of about \$404,819 36, for the sum of \$126,000, which last amount was entered as a credit on the execution. The assets were adjudicated to the United States, and, after the sale, delivered to their agents, who proceeded to collect them. A large amount of other assets was purchased by other persons, and the money paid to the sheriff. It was at first agreed that this money should remain in the hands of the sheriff; but it was afterwards agreed to deposit it in the Bank of Louisiana, subject to the order of the court, until after the appeal pending in the Supreme Court of this State, between the United States and the assignees of the Bank of the United States, before referred to, and the appeal in the Supreme Court of the United States between the Bank and the United States, should be decided.

The first of the above mentioned cases was decided in this court, in June, 1844, and the decision of the inferior court affirmed, whereby the United States were declared to be entitled to receive the whole sum made on the execution; but while the appeal in the one case was pending here, the other had been tried in the Supreme Court of the United States, and the judgment in that case reversed, and a *venire facias de novo* awarded, because of the verdict being erroneous in a matter of law, which judgment was equivalent to a new trial in our jurisprudence.

It may here be stated, that before the judgment and mandate of this court reached the inferior court, the Secretary of the Treasury, or the Treasurer of the United States, drew a draft on Adams and Frazier, the agents, for \$2,000, in favor of the Hon. Henry A. Wise, which the latter refused to pay, on the ground that it was a fee to the District Attorney, for extra services, in the suit of the United States against the Bank, then pending, and that the defendants ought not to pay the fee of the attorney

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for the plaintiffs. Frazier also assumed the ground, that he was not the agent of the United States, but a trustee for them and the assignees of the Bank, and that he would be responsible to the latter, if he paid the draft. A long correspondence ensued between Frazier and the Solicitor of the Treasury, which resulted in the latter informing the former, that the Secretary of the Treasury had revoked the powers conferred on him, as agent, that in future Adams was to be the sole agent, and that all the assets or money, in his (Frazier's) hands, must be delivered to Adams. Frazier still contended that he was a trustee, and not an agent; and declined giving up his trust, notwithstanding the mandate of the Solicitor.

This discharge of Frazier by the Secretary of the Treasury, led the way for a new set of rules, which ended in the controversy now before us. On the 9th of May, 1844, the counsel for the various trustees, the intervenors in the suit, called Frazier and Adams, "in their capacity of agents of the United States of America, or in whatsoever capacity they may hold any funds or property in litigation, or proceeds in any wise representing any property in litigation in the cause," and the United States, by their attorney, to show cause why the said agents should not be ordered and restrained from disposing of any property or funds in their hands, without a specific order of court providing for such disbursement and appropriation, and that an injunction issue, &c. A plea to the jurisdiction, and an answer was filed by the District Attorney of the United States; a trial much contested followed, and the judge below, in a very elaborate opinion, made the rule absolute.

It is not necessary to state this part of the case more fully, as there is no appeal from this judgment.

A few days after this rule was taken, the United States sued Frazier in the Circuit Court of the United States for this State, alleging the circumstances of his appointment and removal as agent aforesaid, and his refusal to give up the property and money in his hands; wherefore they prayed for a judgment restoring to them their money and property so detained, and for \$50,000 as damages.

After the decision of this court was given, affirming the judg-

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ment in the principal contest between the plaintiffs and the assignees of the Bank, the counsel for the aforesaid assignees and the Bank, in their joint names, suggested to the court that the judgment rendered in the case of the United States against the Bank, in the Circuit Court in Pennsylvania, had been reversed by the Supreme Court of the United States, and a *venire facias de novo* ordered. He further suggested the agreement entered into, in August, 1842, in relation to the remission, in case said judgment was reversed, and filed a copy of it; he therefore asked that the plaintiffs might be cited by their attorney, and that Adams and Frazier, agents, be ordered to show cause why a remission of \$251,243 54, with interest thereon from the 20th day of October, 1841, should not be entered upon the judgment so rendered by the Commercial Court in February, 1843; and why the residue of the principal and interest up to that date, with costs, should not be handed over by Frazier and Adams, agents, to the United States, or their proper officer, out of the cash funds deposited in the Bank of Louisiana; and why the other funds and property in the hands of said agents, and all property whatsoever within the jurisdiction of the court, heretofore attached, except a reasonable sum to pay the expenses of the agency, should not be declared free from all claims whatsoever of the United States, and be delivered to W. W. Frazier, agent of the assignees and intervenors aforesaid. But if the court should be of opinion that the assignees are not entitled to that relief, then why the said agents should not be ordered not to pay over any moneys to the United States, except the amount referred to in said agreement, to wit, the remainder of it, after deducting \$251,243 50, with the interest; but to retain the property purchased by the United States under the execution, and all the cash, except that before mentioned, until the final adjudication of the matters in litigation in the Circuit Court in Pennsylvania, or the further order of the Commercial Court.

The plaintiffs appeared and excepted:

1st. That that part of the rule asking permission to carry into effect the judgment of the court affirmed by the Supreme Court, is useless and unnecessary, and presents no question for decision.

2nd. That the intervenors and defendants knew, when the rule was taken, the willingness of the plaintiffs to receive the portion of their judgment, which is not in dispute in the case in Pennsylvania, according to the agreement entered into; and that the said rule was not taken, from any apprehension of an execution being taken out for the whole amount of the judgment, but in fact to induce the plaintiffs to submit to its jurisdiction, or to obtain from the court a decision requiring them to submit to its jurisdiction, in relation to the agreement of which a copy is filed, and in relation to the assets purchased by the plaintiffs, through the agency of Frazier and Adams.

3d. That if the assignees have any rights or claims, either under the first agreement, or to the assets purchased by Frazier and Adams, they are not matters that can be investigated on a rule, but must be by petition; and further, that the court has no jurisdiction.

4th. That the rule states that Frazier and Adams are the joint agents of the government, when it was well known that Frazier had been removed as agent, and that Adams was the sole agent of the United States.

5th. That all the matters in controversy between the government and Frazier in relation to his agency, are pending in two suits in the Circuit Court of the United States, wherein all the questions will be settled.

For answer, in case the exception should be overruled, the plaintiffs say, they are willing to deduct, and have already entered on the execution taken in June, 1843, a credit for \$126,000, being the amount of their purchases at the sheriff's sale; and also to deduct the sum of \$251,243 54, with interest, the amount in controversy in Pennsylvania, letting it remain on deposit until said litigation is finished; and to receive the balance of their judgment out of the funds deposited, or to take an execution. They pray accordingly, and ask that Frazier and Adams be ordered to check on the Bank of Louisiana, for the sum due and interest.

Adams excepted to the form of the proceeding, and to the jurisdiction of the court.

Frazier answered, that divers persons, whose names are given,

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have instituted suits in the courts named, against the Bank of the United States, and that some have caused notices to be served on him in his capacity of agent, and claim to be interested in the disposition of the funds in question. He prays that said parties may be cited to answer the rule. This request was granted, and a number of the parties were notified.

On the 13th of July 1844, after the cause had been tried, Frazier presented a supplemental answer, which the court permitted him to file. It was objected to, and a bill of exceptions taken, which will be noticed in the proper place.

The court below overruled all the exceptions, and proceeded with the trial. The assignees produced the agreement made in August, 1842, relative to the *remittitur*; also a record of a suit from the Circuit Court of the United States in Pennsylvania, showing a reversal of the judgment by the Supreme Court of the United States, in the case for the dividends and damages on the French bills; also the record of the first suit between the parties; and a number of documents, and the testimony of witnesses, to prove that Frazier was a trustee for all parties interested, and not an agent.

The district attorney relied on the judgment he had obtained against the bank. He produced the records of two suits in the Circuit Court of the United States in this city against Frazier, to recover the assets in his hands and damages; also the correspondence with the Solicitor of the Treasury; the proposals of Brooks, the attorney of the bank and the assignees; Frazier's various letters, and the order dismissing him; the list or description of the assets purchased by Frazier and Adams, as agents of the United States; also parol testimony to show the understanding relative to Frazier's appointment and duties.

In July, 1844, the court below gave a judgment, "that on receiving a re-transfer of the assets purchased by Frazier and Adams, agents of the United States, and on the United States discontinuing their suits against W. W. Frazier, and against Frazier and Adams, agents and others, at their own proper costs and charges, there be paid to the United States the amount of their judgment, less the sum of two hundred and fifty one thousand two hundred and forty three dollars, fifty cents; and that,

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in consideration of this offer, all interest on said judgment shall cease from this date."* It was further ordered, that no execution should issue without the special order of the court, and that the decree shall be binding on all the attaching creditors having orders of seizure on foreign judgments; and, finally, the court determined to hold the question of ordering a *remittitur* on the judgment under consideration, until the month of December, 1844. In that month, the judge, stated that he had suspended his opinion until that time, for the purpose of giving the district attorney an opportunity of consulting the Secretary of the Treasury as to whether any settlement could be made on the terms proposed by the judgment in July, and if not, whether or not the money on deposit cannot be invested in United States stock, or be in some other way made to produce interest, for the benefit of the parties; but as nothing had been proposed, the court decreed that a *remittitur* for \$251,243 54, together with the interest thereon from the 20th of October, 1841, should be entered upon the judgment rendered in February, 1843, in favor of the United States against the Bank; it being proved that the judgment in the Circuit Court of the United States in Philadelphia had been reversed, and the record of that judgment being the only evidence on which the court below had given its judgment.

From the two judgments the plaintiffs have appealed.

Our attention will first be directed to the bills of exception.

The first is, to permitting W. W. Frazier to file what is called a supplemental answer about a week after the trial of the case had commenced, when all the evidence seems to have been received, and, in fact, on the very day the judge filed his reasons for his judgment. It was objected to as presented too late, and

* In assigning his reasons for this judgment, the judge of the court below says: "I am of opinion that the offer on the part of the assignees to pay the balance of the judgment of the United States, deducting the sum of \$251,243 50, on receiving an assignment of the assets purchased by the agents of the United States, is reasonable and fair, and in consideration thereof, that all interest on that portion of the judgment of the United States should cease from this date. But this payment, and the right of the United States to receive any portion of this fund, is coupled with the condition that the United States discontinue their suits in the United States courts, at their proper cost and charges." &c. R.

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because it had no connexion with the original answer, or the matters at issue. We think the court below erred in permitting this document to be filed. It was certainly too late. Every issue should be made, and all answers filed, before the trial commences. It must be an uncommon case, to justify the filing of an amendment, or supplement to the pleadings, during the trial; and after the evidence is finished, it cannot be permitted.

The plaintiffs second bill relating to the rejection of Smith as a witness, is not insisted on.

The counsel for the bank and the assignees, offered as evidence, to prove the reversal by the Supreme Court of the United States, of the judgment obtained by the United States against the Bank, in the Circuit Court in Pennsylvania, a printed copy of the record in the Supreme Court of the United States, certified by F. Hopkinson, as clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania; attached to which is a copy of a mandate attested by the clerk of the Supreme Court, commanding said Circuit Court to take further proceedings in the case in conformity to the opinion and judgment of said Supreme Court, also certified by Hopkinson, but the opinion does not accompany it. The counsel for the plaintiffs objected to it, on the ground that it was not properly authenticated; and secondly, as being only a copy of a copy. The court below received it, and the plaintiffs attorney excepted. We are of opinion that the judge erred. The document is not properly certified. There is no certificate to it but that of F. Hopkinson, styling himself the clerk of the Circuit Court of the United States for the Eastern District of Pennsylvania, with the seal of his office attached. There is no evidence that he is the clerk, nor any such authentication as is required by the act of Congress. The counsel for the assignees contends that we are bound to know the clerks of all the United States courts, and to recognise their certificates as legal. He has not quoted any authority for such a position; and we are not aware that there is any law requiring the courts in this State, to give greater weight and authority to the certificates of the clerks of the United States courts in other States, than are to be given to the certificates and official acts of clerks of the State courts in the same State. It has been the practice

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we believe, to recognise the official acts and certificates of the clerks of the United States courts in this State, and of the Supreme Court of the United States; but the practice is based more upon courtesy than positive provision. The judgment of the Supreme Court of the United States is not in this alleged record, and it does not disclose what that judgment is, any further than the recital of it in the mandamus states it.

Upon the question of jurisdiction, we have no hesitation in saying, that, under the agreement entered into in August, 1842, and upon legal principles also, the Commercial Court has jurisdiction of the question whether a *remittitur* shall be entered or not. But as there is no legal evidence to prove that the judgment in Pennsylvania has been reversed at all, we must say that the court was wrong in giving a judgment ordering the \$251,243 54, with interest, to be remitted in the manner it has done.

As to the jurisdiction of the court over the United States, and Frazier and Adams, the agents appointed to purchase the assets, or a part of them, at the sale made in July, 1843, we should have no hesitation in saying, if the agents had not, in so many different ways submitted themselves to the court and recognised it, that the court would not have jurisdiction over any question arising out of the agreement to issue the execution, to purchase the assets, and to dispose of them after the proceeds are in hand. We consider that an independent and separate contract, to be enforced as to any rights the bank, or the assignees may have by virtue of it, not by a rule to show cause, but in the ordinary mode. All that the court should have done when execution was asked for under the agreement, was to have ordered it, and to have left the parties to take care of their own rights, whatever they were or may be. But the parties have so mixed up their proceedings, by rules, submissions and agreements, that it is extremely difficult to separate them from the original proceedings, or to say where the court should stop. If the question was *res nova*, we should say that the court was without jurisdiction to decide, in the present form of proceeding, upon the questions it has decided; but as the objection relates principally to the form of proceeding, we

have concluded that, so far as the present case goes, we will, under its peculiar circumstances, maintain the jurisdiction, and endeavor to place the parties in the position in which their agreements authorise them to stand.

Whilst the appeal in the case of the plaintiffs and defendants and intervenors was pending in this court, and it was uncertain in what way the case would be decided, there was great propriety in keeping the money and property in a situation to be restored to the assignees, in the event of the United States not succeeding in establishing their claim of priority on the property attached, or its proceeds. But now that their rights are settled and fixed to a large part of their demand, we cannot see the necessity or policy of keeping the money locked up, and letting interest accumulate on the debt, and the fund be exhausted, or much diminished by costs and allowances. If the case in Pennsylvania should be decided against the United States, it will not affect a portion of their demand at all; that is fixed and settled. If it be decided in their favor, then the judgment they have, with the right of priority, will cover the whole sum. Every consideration is in favor of settling as many difficulties as possible, and placing the parties in a situation where each will know its real rights.

When we examine all the circumstances of the case, the testimony before us, and the motives that prompted the consent to the sale in July, 1833, we see no sufficient grounds to sustain the position of the appellees, that Adams and Frazier, under their appointment as agents of the United States on the 7th June, 1843, were to hold the assets they might purchase at the sale to be made by the sheriff in July of that year, as trustees for the benefit of all concerned. Previously to this appointment, they held the property as receivers in the capacity alleged, that is, as far as the United States, the Bank and the assignees were concerned; but in June, 1843, the parties for whom they held ascertained that their interests would not be safe if the property continued in that situation. Other creditors of the Bank were pressing their claims; and, having obtained judgments, they were menacing the parties with forced sales under unpropitious circumstances, whereby the whole property was likely to be

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sacrificed. It then became necessary to take some other ground; and, as the United States were an admitted and judgment creditor for a large amount, it was agreed to have a sale, at which the plaintiffs might bid, or not, as they pleased, the object being, first, to secure the debt, and, secondly, to make the property bring as much as possible. But we no where see it agreed or understood, that the United States should be bound to purchase the property, or any part of it, and to hold it for the benefit of the Bank, or the assignees. Such an agreement would imply, and be based upon collusion between the United States, the Bank and the assignees, whereby the government was, under the form of law, to become the purchaser of the property, hold it for the benefit of itself, the Bank or the assignees, and protect it, or them, from the pursuit of other creditors. Such an agreement would be simulated between the parties, and a fraud upon the other creditors. We cannot presume anything so unfair as this between the parties, and we find no evidence that will justify our coming to such a conclusion. The proposition of Brooks no where says, that if Adams and Frazier shall purchase any of the assets proposed to be sold, that they shall be held in trust, or for the benefit of the interested parties. The suits commenced, or to be brought, were not to be effected by the sale, nor was the United States to credit more on its judgment than it should realize from the assets purchased, nor is there any requirement that any balance should be paid over, in case such assets realized more than was owing. The proposition is, that there should be a sale—an open and public one, and not a collusive affair. Neither the Bank nor the assignees pretended to name an agent, nor to instruct or control Frazier and Adams, in any manner, as to how they should proceed, or what was to be done with the funds. They accepted the agency as agents of the United States. The Solicitor of the Treasury tells them to take charge of the assets they may purchase, and to hold them in trust for the United States; to proceed in the collection as fast as practicable, and to pay the money into the Treasury, in discharge of the debt, interest and costs; and that, when that should be paid, with the expenses

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penses of the agency, to pay into court whatever sum may remain, for the benefit of whoever shall be entitled to it.

The counsel for the Bank and the assignees contends that the sale was a "conservative measure," and did not convey an absolute title to the United States for the assets purchased. Such does not seem to have been the idea of the Solicitor of the Treasury: he says that the agents are to hold the money in trust for the United States; and they accepted the agency, with those words plain and palpable in their act of procuration. If we believed that the sheriff's sale was a mere pretext, and a "conservative measure" to preserve the property from the pursuit of other creditors, and then to divide the money between the plaintiffs and the Bank or its assignees, we should at once tell the parties, as this court has told others on several occasions, that they must not call on us to enforce their simulated and fraudulent agreements. But we acquit the parties of all such purposes, and consider the sale, as it is presented to us now, as fair and legal.

In several of the rules and motions with which the record abounds, Adams and Frazier are called the agents of the United States; and in the case now before us they are so styled and proceeded against. They, in our opinion, hold the money and assets as such agents, and as such must account to their principals. If it had not been the intention of all parties to change the relations in which Adams and Frazier stood towards them, they might as well have continued their capacity as receivers. They then held as trustees for the benefit of all concerned; but that position not being safe, it became necessary to change it.

It appears to us that the judge of the Commercial Court labors under a misapprehension, as to the power and control he has over the agents appointed by parties to superintend their interests in the tribunal over which he presides. We have more than once said, that he has no right to appoint receivers and trustees, of his own accord and will, to take charge of money or property, unless in the cases pointed out by law. The law designates who the judicial sequestrator is, and the judge cannot name another, unless the parties agree to his doing so. They can select their own agents, and give them

such powers as they think proper; and the judge cannot impose burdens nor restrictions on such agents, other than those imposed by their principals. In the present case the Solicitor of the Treasury directed Adams and Frazier to take charge of the assets they might purchase; to collect the money as fast as possible, and pay it into the Treasury until the debt, interest and costs, and the expenses of the agency, should be paid; and the balance, if any, to pay into court, to whosoever may be entitled to it. Subsequently, the agents were directed not to pay the money into the Treasury, for reasons given, but to keep it on deposit to their own credit, so that it might be disposed of according to law, when the case in this court, and that in the Supreme Court of the United States, should be decided. The court, therefore, had no right to impose, and erred in imposing, restrictions upon the agents of the government, so as to embarrass the principals in disposing of their property. Nor has the Commercial Court any right or authority to control the United States in the appointment or discharge of its agent or agents, at their pleasure. Every principal has a right to select his own mandataries. Nor has it authority, when simply asked for process to enforce a judgment which the United States had obtained against the Bank, to impose such conditions as have been imposed in this case, and, in effect, enjoin the plaintiffs, without affidavit, or bond and security.

In conclusion, we are of opinion that all the assets purchased at the sheriff's sale made in July, 1843, by Frazier and Adams, as agents of the United States, belong to the United States; and that the proper officers of the government have a right to appoint agents to keep, collect and manage them, and such agents to remove at pleasure, without the consent of the Commercial Court. The government also has a right to appoint its own agent or agents to take care of the money received from the sheriff as the proceeds of the sale made in July, 1843; and also to remove said agent or agents. Therefore, we are of opinion that William W. Frazier, having been expressly discharged as an agent of the United States, can no longer act as such; and that Christopher Adams, junior, is now the sole

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agent, subject to the orders of his principals, and that he must be relieved from the restraining orders of the court.

It is understood that no objection is made, on the part of the United States, to the sum of \$251,243 54, with interest thereon at six per cent per annum, from the 20th day of October, 1841, until the day of its receipt by the sheriff, remaining on deposit, being returned to the assignees, or whoever shall be entitled to it, in case the suit of the United States against the Bank of the United States, in the Supreme Court of the United States at the date of the agreement made, in August, 1842, be decided in favor of the Bank; and as to the balance of their claim, the plaintiffs are entitled to it, and no objection is made on the part of the assignees of the Bank to its being paid; but they wish to take the assets purchased by the United States at the sheriff's sale, to which we think they have no right.

It is, therefore, adjudged and decreed, that the judgments appealed from be annulled and reversed; and proceeding to give such judgment as, in our opinion, should have been given in the court below, it is ordered and decreed, that there be deducted from the judgment in favor of the United States the sum credited on the execution, in July, 1843, as the amount of the purchases made at the sheriff's sale, to wit, the sum of one hundred and twenty-six thousand dollars; and that the sum of three hundred and sixty-five thousand one hundred and nineteen dollars and eighteen cents, on deposit in the Bank of Louisiana, stand to the credit of Christopher Adams, junior, as sole agent of the United States, out of which he will retain the sum of two hundred and fifty-one thousand two hundred and forty-three dollars and fifty-four cents, with interest, at six per cent per annum, from the 20th day of February,* 1841, until said sum was received by the sheriff, in July, 1843: said sum to be returned to the said assignees of the Bank of the United States, or whoever else may be entitled to it, whenever said Bank, or the assignees, shall establish, in a legal manner, that the aforesaid judgment in favor of the United States against the Bank of the United States has been reversed; the balance on deposit in

* *Sic* in MSS.

said Bank of Louisiana to be disposed of by the said Christopher Adams, junior, in such manner as his principals may direct. The said Bank of the United States, and the assignees thereof, to pay the costs of the proceedings in the court below on the rule, and also the costs of this appeal. And it is further ordered, that this judgment be without prejudice to whatever rights the said assignees may have to any surplus, if any there should be, in the realization of the assets purchased by said agents over and above the amount at which the same were adjudicated at the sheriff's sale, to wit, the sum of \$126,000; which rights, whatever the same may be, are reserved to the said assignees. This reservation not to be taken as interfering with the title of the United States to the assets purchased by them, or their right to collect the same and apply the proceeds, as stated in the letter of the Solicitor of the Treasury, dated June 7th, 1843, addressed to Messrs. W. W. Frazier and C. Adams, junior, wherein he directs them to assume the care, management and collection of such assets and *choses in action* as they may purchase, and in what manner they shall apply the proceeds of the same.

Peyton, District Attorney of the United States, for the appellants. *I. W. Smith*, on the same side.

T. Slidell, for the defendants.

WILLIAM H. AVERY v. JULIEN ALLAIN and another.

A plaintiff who holds under an act of sale which expressly declares that the vendor sells only such rights as he has to the property, and that the vendee has a knowledge of his title thereto, has not acquired such a just title, translatif of property, as will serve as a basis for the prescription of ten years.

Where one, who sells all the rights, claims, or privileges he has or may have to a second concession in the rear of a front tract, without warranty, or stipulation to make a title, subsequently becomes the owner of part of the land in the rear, by purchase from a third person holding under another title, he may hold, against his vendee, the property thus acquired by him. *Per Curiam*: To hold him bound to make the title of his vendee good, would be to enforce a warranty of title, where none was intended to be given.

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APPEAL from the District Court of Iberville. *Deblieux, J.*

GARLAND, J. The plaintiff claims to be the owner and possessor of a tract of land of twelve *arpents* front on the Mississippi river, by a depth of eighty *arpents*, with lines opening to the rear ten degrees. The defendants aver that they are the owners and possessors of a tract of twenty *arpents* front on the bayou Manchac, with a depth of forty *arpents*. The distance between the two rivers not being one hundred and twenty *arpents*, the claims conflict with each other in the rear, and about seventy-seven and 11-100 acres are in dispute. Both parties claim them by virtue of their titles, and also by possession and the prescription of ten years.

The documents in the record do not make out a complete claim of title in the plaintiff to any part of the land; but it is admitted by the defendants, "that the plaintiff has a regular chain of titles from the original *requête* of Pierre Allain, *fils*, derived from the government, on the 2nd of July, 1787;" and it is also admitted by the plaintiff, "that the defendants have a regular chain of titles from the original one produced, obtained from the Spanish government."

It appears from some recitals in one of the acts, that in the year 1774, Pierre Allain, *père*, obtained from the Spanish governor, Unzaga, a concession for seven *arpents*, twenty-five toises, and five feet front on the Mississippi river, by the depth of forty *arpents*. On the 5th May, 1787, Pierre Allain, *fils*, presented a petition to governor Miro, asking for a grant of land, in the rear of his father's tract, of forty *arpents* in depth, with a front on his rear line, and opening in the same manner as the side lines of the front tract. At the foot of this petition the governor answered: "No ha lugar esta petition, respeto a que la segunda profundidad no se concede, sino al propietario de la primera, y aunque el padre lo permita, puede ser con el tiempo motivo de disputas y discenciones." On the 10th of July, 1787, Piere Allain, *père*, sells to his sons, Simon and Pierre, each one half of his front tract of land with the depth of forty *arpents*, and to Pierre alone the "seconde concession dans la profondeur, sur les même lignes de toute la face de cette sus-dite, pour le prix et somme de cent piastres, qu'il declare avoir reçu comp-

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tant, s'obligeant de lui . . . les titres en forme, à sa requisition." On the 31st of January, 1791, all the parties to the last mentioned act agreed to change or modify it, and did so, by substituting a sale from the father to Simon Allain for four *arpents* front on the river, on the upper part of the tract, by eighty in depth. between parallel lines; and to Pierre Allain, *fils*, the remainder of the tract, ("le reste entier de la terre,") with all the opening or divergence of the lateral lines to the depth of eighty *arpents*, "*avec l'éventaille entiere jusqu'a quatre-vingt arpents.*"

By some acts or conveyances, not stated in the record, it seems that the widow of Simon Allain became the owner or possessor of five *arpents*, twenty-five toises, and five feet front of the tract said to have been granted by Unzaga, in 1774; and in May, 1819, her heirs sold that much front, by forty *arpents* in depth, to Carlos De Armas; and, in 1826, by another act under private signature they said that at the sale in 1819 it was understood that all their rights, pretensions and claims to the double depth were sold with the front tract; but there is no warranty of the title nor consideration other than the original price. In November, 1828, Janvier Allain sold to Carlos De Armas a tract of land of three *arpents* front on the river, by forty in depth, with a certain opening in the side lines of the first concession, together *with all the rights, claims and privileges he has, or may have, to the second concession*, which it is said had been purchased from the United States.

Several acts of sale, exchange, and partnership were subsequently passed between Carlos De Armas, Christoval G. De Armas and Felix De Armas, in all of which the parties seem to have had some doubt as to their title to the back land, as in some of them no warranty is given, until by an act passed on the 11th of February, 1832, from Carlos De Armas to P. Dubertrand, the title to the whole tract of twelve *arpents* front by eighty in depth, with a greater opening to the rear than most of the acts called for, was finally vested in him. In this sale it is said, that Dubertrand *has knowledge of the titles to the plantation*; and further, that it is understood that the general warranty given by the act does not apply to the double concession, but only to *all the vendor's rights to the same*.

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On the 29th of December, 1834, Dubertrand, by an authentic act, sold the whole land, with a general warranty, to the plaintiff and one John G. Banks, whose half plaintiff subsequently purchased. In the sale from Dubertrand, although there is a general warranty of title, there is a clause which says, "that in case of eviction of any part of the said land, Dubertrand promises to purchase back said part from the successful claimant, and to reinstate the purchasers in full possession thereof, or to pay them the value of the same, with all damages."

There is no evidence that the titles under which the plaintiff claims have ever been recognized or confirmed by the United States, except so far as relates to the back land bought of Janvier Allain, (and that is imperfect,) which does not appear to interfere with the defendants' pretensions, except for the quantity of six and 61-100 acres. No confirmation by Congress or the commissioners is shown, nor any location or survey under either the Spanish or American government, of the front or back lands. The parol testimony shows that old lines were found in the woods, but by whom made, or for what purpose is not explained, nor is the time of marking them proved. Some fifteen or twenty acres were cleared in the rear of the first forty *arpents* when the plaintiff purchased the plantation of Dubertrand; but this clearing does not include any part of the land in dispute.

The defendants set up title under two orders of survey, made by the governor of the province of Louisiana, both dated the 30th September, 1793; one to Joseph Richard, for fifteen *arpents* front on the bayou Manchac, with a depth of forty *arpents*, and the other to Santiago McCulloch, for eight *arpents* front on the same bayou, with the ordinary depth. Each of these claims was located and surveyed in December, 1797, by Miguel Walsh, authorised for that purpose by Carlos Trudeau, surveyor general of the province, and plats signed by him are in the record. These titles passed through different persons to one James Jones, in whose name they were presented to the United States commissioners, and confirmed by them, on the titles and proof of cultivation and habitation. From Jones twenty *arpents* front of these two tracts have, by various probate and sheriffs'

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sales, and other conveyances, become vested in the defendants, by a sale from Janvier Allain, dated the 21st day of January, 1832; and under that and the preceding titles, they say that they have a better title than the plaintiff to the land in controversy, and also claim to hold it by the prescription of ten years.

The claim of Jones was regularly surveyed and located in May, 1840, by a United States surveyor, and his operations were approved by the surveyor general.

The parol testimony shows that Janvier Allain settled on the land in 1828, soon after he purchased it, and that he remained for several months, when he was driven off by high water. He returned again after the waters subsided, remained some time, and left it. Santiago McCulloch also lived on the land under the Spanish government; and the defendants have, since their purchase, frequently exercised acts of ownership, by going on the land, remaining there at work, with their slaves, for a considerable time, and by cutting down and carrying off timber. The plaintiff, as far back as 1838, went on the land in dispute, and at various times cut wood and timber on it; and Roth, one of the defendants, in 1838, whilst acting as overseer of the plaintiff, took firewood and timber from it, as being his (plaintiff's) land.

The District judge gave a verdict for the plaintiff, principally on the ground of his having acquired a right to the whole depth of eighty *arpepts*, by the prescription of ten years, based on the sale from Carlos De Armas to Dubertrand, on the 11th of February, 1832, under which title the plaintiff claims. From this judgment the defendants have appealed.

We concur fully in the opinion expressed by the court below, that Pierre Allain, *fils*, acquired no title from the Spanish authorities, by the presentation of his petition to Governor Miro. That functionary says, in express terms, that he cannot grant the land, as no one is entitled to ask for it but the proprietor of the first or front concession; and even if the father of the applicant consented to the grant, it would not be prudent to give it, as it might lead to future difficulties. Pierre Allain, *père*, never applied to the Spanish government for a title to the land back of his front tract, nor did either Simon, or Pierre Allain, *fils*, ever

make such application, after they purchased from their father; consequently, none of them show any title out of the sovereign. By the usage and regulations in force in the province of Louisiana, the back lands, to the extent of forty *arpents*, were often granted to the proprietors of the front tracts; but no title vested in consequence of this usage, unless the lands were asked for and conceded by the proper authority. These parties having no title themselves, could not sell more than they had, which was a mere right of possession.

Upon the possession obtained, as above stated, the plaintiff contends that he has acquired a title as against the defendants, by the prescription of ten years, based on the sale from Carlos De Armas to Dubertrand, dated the 11th of February, 1832, this suit having been instituted on the 15th day of April, 1842, being about ten years and two months; and so the court below decided. In this we think there is error. In the sale from Carlos De Armas to Dubertrand, the latter acknowledges that he has full information as to the titles to the property, and that the stipulation of general warranty is not to apply to the back lands, but only to convey the personal rights of the vendor. This is, in effect, only a sale of all the rights, title and interest of Carlos De Armas, and presents the same question as was decided in the case of *Eastman, Syndic, &c. v. Beiller* (3 Robinson, 221). There the vendor gave only a warranty against himself, his heirs, and those claiming under him; and that, we said, was not such a just title, translativ of property, as the plea of prescription of ten years could be based on, if the title should prove defective. The fact of a vendor refusing to guaranty the title he sells, is a circumstance calculated to excite suspicion as to its validity, and should put a vendee on his guard, and induce him to make inquiries as to it. This effect, it appears, was produced on Dubertrand, who admits that he had full information as to the title, and took possession under it as it was.

Besides the entire want of title to the back lands emanating from the Spanish authorities, no claim has been set up against the United States, for the lands in the rear of the tract of five *arpents*, twenty-five *toises*, and five feet front on the river, sold by the

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heirs of the widow of Simon Allain to Carlos De Armas, either on the ground of being entitled to it by a concession from the Spanish government, or as being entitled to it under any of the laws passed by Congress, giving to the front proprietors a preference in purchasing the lands back of their front tracts at the minimum price of the public lands. We, therefore, must presume that the land forms a part of the public domain. It also may be questionable, if we were to assume that the plaintiff is the owner of a quantity of land back of his front tract equal to the quantity in said front tract, which is all he can be entitled to under the acts of Congress, whether there will be any interference of the back lines at all.

The plaintiff's counsel further insist, as Carlos De Armas purchased three *arpents* front of the tract of land sold to Dubertrand of Janvier Allain alone, and of him and Simon Allain, as two of the heirs of the widow of Simon Allain, that, therefore, when they became respectively the owners of the land now claimed by the defendants, the plaintiff was entitled to take out of the newly acquired land sufficient to make up the deficiency in that sold, if it should arise from an interference of the land newly acquired. This argument, at first, seemed to have much force; but, upon examination, we do not think it sound. Janvier Allain only sold to De Armas such right, interest and pretension as he might have to the lands back of the front tract, without warranty, or any stipulation to make a title. He sold such rights or pretensions as he might have under a particular act of Congress; but never promised that he would not purchase any other land adjoining it held under another title, and that if he did, and there should be an interference, that then he would make the first right good by ceding to it the full quantity out of the second right acquired. This would, in effect, be a warranty of title, when none was intended to be given. Janvier Allain did not sell to Carlos de Armas any particular quantity of land in the rear of the front tract, but only such quantity as he might be entitled to there. Now, previously to this sale, the United States had confirmed to Joseph Richard and McCulloch, the title to their respective tracts of land, and thus re-

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linquished all title to the land within the limits of those titles, and could not sell the same to Janvier Allain, or any other person.

As to the land back of the tract acquired from the heirs of the widow of Simon Allain, the relinquishment of the heirs, in 1826, to Carlos De Armas, is weaker than the transfer of Janvier Allain to him. The reasoning applicable to that transfer applies, therefore, with more force to this. Simon, and Janvier Allain are two of the heirs of Madame Simon Allain, and if the doctrine of the plaintiff's counsel be correct, then the two Allains would only be liable for portions as such heirs, and consequently only bound to make up or give the plaintiff such portions of any deficiency in his quantity out of their subsequently acquired land; and this they would be bound to do upon the principle of being in some way warrantors, whilst their co-heirs, who are as much bound as they are by the act under private signature, passed in 1826 to Carlos De Armas, are not bound for any thing at all. Thus two heirs, from the fact of becoming proprietors, subsequently to their transfer, of contiguous lands, would become warrantors, and the others not.

It is ordered, that the judgment of the District Court be reversed, and ours is in favor of the defendants, as in case of non-suit, with costs in both courts.*

De Armas, Lockett and Micou, for the plaintiff.

Labauve, for the appellants.

* *Micou*, for the plaintiff, for a re-hearing. The question is, not whether the plaintiff's title is good against all the world, but whether the vendor himself can disturb the possession of his vendee, on the pretence, that the title which he has given is defective. The question has nothing to do with the law of warranty. The expression, that "the law implies a warranty against the acts of the vendor himself," is frequently and familiarly used, but does not clearly express the idea intended to be conveyed. A warranty is properly an engagement of one person, to protect another against the acts of a third. A warranty against the acts of the person granting, is superfluous. Whether such warranty is express or not, both law and justice forbid the grantor to disturb the title he has given—to destroy his own work, to the prejudice of his grantee.

Had Avery been evicted by a third person, he might have no recourse in warranty against his vendors, because they refused to warrant his title; or, if they had warranted, they would be held bound only in proportion to their interest on the property sold. But this rule has no application when the vendors themselves attempt to disturb the title they have given. They all joined in the sale

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of the whole estate, without separating their interests. Each was vendor *par mie et par tout*. Each of them, by selling, imposed upon himself, his heirs and successors, the obligation of respecting the title he had given. "Although it be agreed that the seller is not subject to warranty, he is, however, accountable for what results from his personal act, and any contrary agreement is void." Civil Code, art. 2480. Where a vendor, having sold by a defective, afterwards acquires a perfect title, the acquisition of the new title will enure to the benefit of the purchaser. 12 La. 170. The vendor could not use the new title, because the law prohibits him from disturbing the possession he has given. If ten *arpents* be sold by a defective title and without warranty, and the vendor afterwards acquires an *arpent*, the title of his vendor is secured to the extent of his acquisition. It follows, that the plaintiff's action must be maintained. If the defendants have a title acquired either since, or before, the sale to plaintiff's vendors, that title passed to the plaintiff. If they have no title at all, they are mere trespassers, and the judgment of the court below must be confirmed.

With regard to the possession of the plaintiff, and its extent, it is admitted of record, that the plaintiff holds under a continuous chain of title from the *requête* of P. Allain, *fils*, in 1787. It was shown by the acts offered in evidence, that the Allain family possessed the back concession for many years, until they at last sold to De Armas. The title to the back concession is informal and defective, but nevertheless it was treated by the Allains as a title; they must be supposed to have possessed by lines in accordance with it; and the possession of De Armas, and of the plaintiff, must be considered in the same light. Such being the relation of the parties, mere civil possession, independently of the acts of ownership, is sufficient to establish the rights of the vendee against the vendor.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN THE
WESTERN DISTRICT, AT OPELOUSAS,
SEPTEMBER, 1845.

PRESENT :
HON. HENRY A. BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

MARIE LOUISE BROUSSARD v. VALERY BROUSSARD, Her Husband, and
others.

Though the general rule established by the Civil Code is, that purchases made during the marriage by either spouse, belong to the community, in whosoever name made, yet a wife may acquire separate property by the *bona fide* reinvestment of her paraphernal funds, of which her husband never had the administration, or by a *dation en payement* in consideration of a separate and paraphernal claim.

A judgment in a suit for a separation of property will not be conclusive against the wife's right to property, not mentioned as her separate property in the judgment of separation, in a contest with the creditors of the husband, especially with such as became so before the judgment was rendered.

APPEAL from the District Court of Lafayette, *Boyce, J.*

BULLARD, J. The only question which this case presents is, whether the slave Josephine and her increase belong to the community lately existing between Marie Louise Broussard and Valery Broussard, her husband, or whether they are the sepa-

rate property of the wife, who is separated of property from him. This question arises between the wife and a creditor of the husband who had caused a writ of *feri facias* to be levied upon the slaves, as the property of the community, and was arrested in this proceeding, by injunction. The injunction was dissolved, and the wife appealed.

The evidence shows that Josephine had belonged to a former community existing between the appellant and her first husband Thibodeaux. That she had been purchased by Caruthers, who married one of the heirs, and that, after the second marriage, he had sold her to the appellant, with the consent of her husband, for the price of \$540, as expressed in the act of sale. It appears that the same amount was due by Caruthers, for the price of the slave, and that suit had been brought by the plaintiff, for herself, and as tutrix of her minor child, the heir of Thibodeaux, her first husband, to recover that amount, with interest. It further appears that when the plaintiff sued for a separation, she claimed the same slaves, and the judgment as first drawn up embraced them, but they were struck out by the judge before signing the judgment.

It is contended by the plaintiff's counsel, that Josephine became her separate paraphernal property, in virtue of the purchase in her own name, with the consent of her husband, and with her own funds, it being evident that the sum acknowledged to have been paid as her price, was in fact due by Caruthers, for his purchase of the same slave. If the record furnished satisfactory evidence of this fact, we should find it difficult to distinguish between this case and that of *Dominguez v. Lee*, in the 17 La. p. 295, and in other cases more recently decided, in which we held, that although the general rule established by the Code is, that purchases made during marriage, by either of the spouses, belong to the community, in whosoever name they may have been made, yet that a wife might acquire separate property by the *bona fide* reinvestment of her paraphernal funds, of which her husband never had the administration, or by a *dation en paiement* in consideration of such a claim. The identity of the sum due by Caruthers for the price of Josephine, and the price set forth in the sale from him to the plaintiff, of the same

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slave, renders it somewhat probable that the sale was in truth intended only as a retrocession. But we find no proof in the record that Caruthers has been released from the payment of that sum.

Under these circumstances we have thought that justice requires that the case should be remanded for a new trial, and to enable the parties to furnish any further evidence in their power; not being satisfied that the judgment in the case of the plaintiff against her husband, in which the slave was omitted, is conclusive against her, as it relates to creditors of the husband, especially such as became so before that judgment was rendered.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, that the injunction be reinstated, and that the case be remanded for a new trial, the appellee paying the costs of this appeal.

Crow and Porter, for the appellant.

Neveu and Voorhies, for the defendants.

JOHN J. GARRETT v. JAMES MORGAN, Sheriff of the parish of St. Landry.

Plaintiff having purchased a slave from a third person, transferred to the latter in payment of the price a part of a twelve-month's bond. In taking out execution on the bond, plaintiff's attorney, by mistake, ordered the clerk to credit the execution with the amount of the part of the bond so transferred. The balance due on the bond having been collected by the sheriff, the transferee claimed to be paid the amount transferred to him out of the sum in the hands of the sheriff, in preference to plaintiff: *Held*, that the transferee cannot be prejudiced by the mistake of the plaintiff's attorney, and is entitled to the amount claimed.

Letters written by a third person to an agent are inadmissible in evidence against the principal.

APPEAL from a judgment of the District Court of St. Landry, *Boyce, J.*, against the plaintiff, and in favor of Joseph Hughes, who had intervened in the suit, claiming the amount in defendant's hands.

BULLARD, J. The plaintiff brought his action against the sheriff of the parish of St. Landry, alleging that he had collected for

him, on a writ of *fiery facias* against John L. Daniel, the sum of five hundred and fifty dollars, which he had refused to pay over.

Joseph Hughes intervened in the case, and opposed the payment by the sheriff to the plaintiff, alleging that the money had been made on an execution issued on a twelve-month's bond given by Daniel, and that the intervenor had paid to the plaintiff a part of the bond or judgment, and had taken a transfer from the plaintiff of the judgment to that amount, that is to say, \$550, now in the hands of the sheriff. He, therefore, prays for judgment ordering the sheriff to pay the same over to him, and not to the plaintiff.

The facts appear to be, that Hughes sold to the plaintiff, by his agent, Joshua Baker, a slave for \$550, and in payment took a transfer of that amount of the judgment or twelve-month's bond against J. L. Daniel in his favor. That afterwards Splane, the plaintiff's counsel, ordered out execution on the bond, and wrote to the clerk, "that the bond is entitled to a credit of five hundred and fifty dollars, paid on the 17th day of August, 1842, in the sale of a negro boy Tom, by Joshua Baker, agent of Hughes, to said Garrett." According to this instruction, the clerk credited the execution with that amount, and the sheriff proceeded to make the balance due upon the judgment, and out of that sum the intervenor claims the right to be paid the amount for which the plaintiff had transferred the judgment to him.

The evidence is quite satisfactory, that the price of the slave sold by Hughes was not intended to extinguish the judgment against Daniel *pro tanto*, but that Hughes became thereby, in relation to Garrett, a part owner of the twelve-month's bond. The attorney of Garrett was evidently mistaken in supposing, that the execution was to be credited with that amount, and the intervenor cannot be prejudiced by that mistake.

The court, in our opinion, did not err in rejecting, as evidence against Hughes, letters written by Daniel to Joshua Baker; but, even if admitted, they are far from proving that Hughes intended to pay the judgment, without a subrogation to the rights of Garrett.

The judgment of the District Court is, therefore, affirmed, with

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costs, reserving to the plaintiff whatever legal remedy or right he may have of proceeding against the principal and sureties on the twelve-month's bond, for the purpose of setting aside and annulling the credit entered on the same, if made in error, or without consideration, and of enforcing the same.

Splane, for the appellant.

T. H., and *W. B. Lewis*, for the defendant, and intervenor.

ALEXANDER R. SPLANE v. JOHN L. DANIEL.

An endorsement of a partial payment, in the hand writing of the holder of the note, without other proof that a payment was made at the date mentioned in the endorsement, is insufficient to interrupt prescription.

APPEAL from the District Court of St. Landry, *Boyce*, J.

Splane, appellant, *pro se*.

T. H., and *W. B. Lewis*, for the defendant.

MORPHY, J. This action is brought upon a promissory note for \$578 57, drawn by Curtis and Daniel, to the order of Babcock, Gardiner & Co, and by the latter endorsed to the plaintiff, without recourse. The note bears date the 16th of February, 1833, is payable six months after date, and draws interest at eight per cent per annum from maturity until paid. On the back of this note, a credit is endorsed in the hand writing of the plaintiff for two hundred dollars, received of B. C. Curtis, on the 14th of February, 1835. To this demand, the defendant, among other means of defence, sets up the plea of prescription. He had a judgment below in his favor, from which the plaintiff appealed.

More than five years having intervened between the maturity of the note sued on, and the inception of this suit, which was brought only in November, 1839, the defendant's plea must prevail, unless prescription is shown to have been interrupted in one of the modes pointed out by law. The credit endorsed on the note being in the plaintiff's own hand writing, cannot avail him, unless he shows that the payment was made to him at the time therein mentioned. This he attempted to do by examining Charles Gardiner, a member of the firm of Babcock, Gardiner

Jenkins and another, Administrators, v. Theriot.

& Co, from whom he had received this note for collection, and by whom it was subsequently transferred to him. This witness states that on the books of the firm, there is, on the 14th of January, 1837, a credit in favor of the plaintiff for \$410, on account of this note. He does not recollect when the transfer of this note was made to the plaintiff, but believes it was after the payment of this sum. Nor does he mention whether any other sum was paid at the time of the transfer. Another witness, B. A. Curtis, the former partner of the defendant, and the very person who is mentioned as having made the payment on the note, was also examined on behalf of the plaintiff. No direct interrogatory was put to him in relation to the time and circumstances under which this payment was made; but, in answer to the general interrogatory calling upon him to state all facts that might be important to the plaintiff, he says, that there is a credit of two hundred dollars endorsed on the note, without stating when this payment took place, or if it was made by him. This evidence does not authorise us to reverse the judgment of the District Court.

Judgment affirmed.

JOHN J. JENKINS and another, Administrators with the will annexed of Alexander Leo Fenwick, deceased, v. CHARLES THERIOT.

Action to recover certain slaves purchased by defendant from a third person, in whose possession they were at the time of the sale. It was proved that they had been brought into this State by the vendor as the administrator of the succession of plaintiffs' ancestor, and had remained in his possession several years; that they had been seized under execution as the property of the vendor, and offered for sale, but were not sold in consequence of the general notoriety of the fact, that they were not the property of the party in whose hands they were seized; and that defendant was present when they were offered for sale, probably with a view to bid for them: *Held*, that the facts warrant the presumption that the defendant was aware of the defect in the title of his vendor. Judgment for the plaintiffs.

APPEAL from the District Court of St. Martin, *King, J.*
Magill, for the plaintiffs.
Voorhies, for the appellant.

Duplessis v. Lastrapes.

BULLARD. J. This case is similar to the two last decided of the same plaintiffs v. Thenet et al. (9 Rob. 34), and the Same v. Dutel, (9 Ib. 36). It was instituted to recover other slaves belonging to the same estate, and sold at private sale to the defendant. The evidence of notice to the defendant of the title of the estate of Alexander Leo Fenwick, is somewhat different. It is not shown that he was personally informed by the witness, as sworn to in the two last cases. But it is shown that the slaves had been seized by the sheriff as the property of Joseph Fenwick; that they were offered for sale, but not sold; that it was a matter of general notoriety on that occasion, that the slaves did not belong to Joseph Fenwick, and that the defendant, Theriot, was present. The witness testifies that he had conversations with several persons who knew the fact, and, in his conversations with them, announced the true ownership. Witness' father did the same, but does not know that Theriot was present at these conversations, or that he knew that the slaves did not belong to Fenwick.

The circumstance that the slaves could not be sold by the sheriff, in consequence of a general knowledge of Fenwick's want of title, when Theriot was present, probably with a view to bid for the slaves, which he afterwards purchased, furnishes such a presumption of his knowledge of the defect of title in his vendor, that we do not feel authorised to say that the court erred in giving judgment against him for the slaves.

Judgment affirmed.

FRANÇOIS DUPLESSIS v. CHARLES LASTRAPES.

An appeal will lie from an interlocutory judgment which may work irreparable injury.

The defendant in an action of boundary cannot, under the allegation that, if the boundary claimed by plaintiff be established, his own boundaries will be so altered as to include land held by third persons, claim to have them made parties to the suit. *Per Curiam*: The defendant had no right to call his vendors in warranty; the plaintiff did not seek to evict him from any land sold to him, but only to establish that he had improperly changed his boundaries.

APPEAL from the District Court of St. Martin, King, J. The

plaintiff prayed for damages for a trespass upon his land, committed by the defendant, and for a judgment establishing the boundary between his land and the defendant's.

MARTIN, J.* This is an action of trespass, alleged to have been committed by the defendant on the plaintiff's land. The defendant pleaded the general issue, urging the *locus in quo* not to be within plaintiff's land, but within that of the defendant. In other words the action assumed the character of one of *bornage*. The defendant filed an amended answer, stating that if the plaintiff proved himself entitled to locate his land as claimed by him, that is to say, by running the lower line of his tract down the bayou, the defendant would become entitled to have the lower line of his own tract, which would be thus displaced, moved down the bayou, and entitled to take land now in the possession of Thomas and Picoud. He, therefore, prayed that they might be made parties to the present suit.

These new defendants being cited, called in the persons under whom they claimed, to warrant their title; and further urged, that if Lastrapes, the original defendant, was entitled to have his own tract located as he prayed, and to have his lower line moved down the bayou, the respondents would become entitled to have their own lower line removed also down the bayou, over land claimed by, and in the possession of, Guidry and Le Blanc. They therefore prayed for leave to make them parties to the suit. The plaintiff now filed his bill of exceptions to the leave granted by the court to Lastrapes, to make those under whom he claims, and Thomas and Picoud, his lower neighbors, parties to the present suit, on the ground that the leave and the continuance of the cause thereon, would produce irreparable injury to him, by procrastinating his suit to an indefinite period, creating vexatious costs and delays by the introduction of matter foreign to the issue.

The plaintiff offered to waive his objections, and allow the new parties to be made, if they would consent to an immediate trial; as Thomas and Picoud were not called in warranty by Lastrapes, but were directly attacked for a distinct tract of land, other than that on which was the *locus in quo*. The court

*SIMON, J., did not sit on the trial of this case.

Duplessis v. Lastrapes.

overruled the exception; the plaintiff appealed, and has placed his case before us on his bill of exceptions.

It has been contended that the appeal ought to be dismissed, as it was not taken from a final judgment. We have frequently sustained appeals from interlocutory judgments, and are bound to do so whenever the party would sustain an irreparable injury if not relieved by us. *Newell v. Morton*, 3 Rob. 103.

The object of the suit was to fix the boundaries of the land of the original parties. It should have been restricted to that.

If it be conceded that the defendant had the right of making his neighbors parties, and they their own, there would be no limitation to the number of parties that might be thus brought in.

Lastrapes had no right to call his vendors in warranty, because the plaintiff did not seek to evict him from any land sold to him, but only to contend that he had improperly changed his boundaries. If his neighbors have encroached on any part of his land, the plaintiff cannot be compelled to have his suit delayed until the controversy to which the real or pretended encroachment gave rise is settled.

The District Court, in our opinion, erred. It is, therefore, ordered and decreed, that the order authorising Thomas and Picoud, and Guidry and Le Blanc to be made parties to the present suit, be rescinded, and their answers set aside, and that the case be remanded for further proceedings according to law; the defendant and appellee paying the costs of the appeal.

Voorhies, for the appellant.

T. H., and W. B. Lewis, for the defendant.

Heard and Magill, for the warrantors.

ADOLPHE FOLLAIN and others v. ANTOINE DUPRE and others.

Fraud will not be presumed. It cannot, generally, be proved by direct and positive evidence ; but the circumstances going to establish it must be strong, consistent, and calculated to induce the belief that a fraudulent intent existed.

Fraud in obtaining an endorsement, is no defence to an action against the endorser, by one to whom the note had been transferred in the usual course of business, for a good consideration, without notice, unless fraud or collusion can be proved as to him. It is not indispensable that demand of payment of a note or bill should be made, and notice of non-payment given, by a notary.

Where a plaintiff relies on the protest and certificate of a notary, under the act of 13 March, 1827, to prove a demand of payment and notice of protest, parol evidence is inadmissible to explain, contradict, or add to the written evidence ; nor can a portion of such evidence be used to make out one part of the case, and the testimony of the notary, as to any thing required by law to be inserted in such acts, to make out another part. As to any other facts, the notary is competent. But a plaintiff may offer the protest and certificate in evidence, and the parol testimony of the notary to prove a demand and notice, with the view, in case the protest and certificate should be insufficient under the statute, to rely on the parol evidence alone. If the protest and certificate be imperfect and insufficient under the statute, they are not the best evidence, and, consequently, parol testimony cannot be excluded as secondary.

A notary cannot testify as to any thing which will contradict or strengthen his official acts.

The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties.

Where a number of interrogatories have been propounded to different witnesses, an exception that they "contain leading questions," without further specification, will be disregarded, as too general.

The acts of 14 March, 1823, and 13 March, 1827, authorising notaries, parish judges, and, in some cases, justices of the peace, to protest and give notice of the protest of bills and notes, have introduced no new rule as to demand of payment, or the diligence to be used in giving notice of protest. They merely introduced a new mode of proof, unknown to the commercial law.

A protest by a notary of a domestic bill or promissory note for non-acceptance or non-payment, and his certificate of notice to the endorser, are inadmissible under the general commercial law. They are only received where there is a statute or local law authorising their admission. By the act of the legislature of this State, of 13th March, 1827, a notary is authorised to do what the holder of the bill or note is required, under the commercial law, to do himself, and to certify the facts officially ; but the mode of proof authorised by the statute is not exclusive.

A presentment of a bill or note for payment, and notice of non-payment given by an agent of the holder, or by any person lawfully in possession for the purpose of demanding payment, is sufficient.

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A notary to whom an inland bill had been given to demand payment, testified, that he called on the day of payment, during the usual business hours, at plaintiff's counting-house, which was named, on the face of the bill, as the place of payment, but found no one there, and that he waited a short time without seeing any one of whom he could make a demand; that he afterwards sent his clerk to make a demand, who returned the note to him unpaid; and that one of the plaintiffs soon after came to the notary's office, where he demanded payment of him, and was informed that the bill could not be paid: *Held*, that the demand made of one of the plaintiffs at the notary's office, and his answer, show that the note would not have been paid though he had waited longer, or some one been present when he called at the place of payment; that no injury resulted to the endorser; and that the demand was sufficient.

A demand of payment of an inland bill, made by the clerk of a notary to whom the bill had been given for the purpose of making a demand and giving notice in case of dishonor, is sufficient. The notary had a right to appoint a substitute, for whose acts he was answerable. And where, in such a case, the notices of non-payment were made out by the notary, and deposited in the post office by the clerk, the notice will be good.

The provisions of the statute of 13 March, 1827, requiring notice of protest to be sent to an endorser at his usual residence or domicile, are the same as those of the commercial law. The domicile of a citizen being, according to art. 42 of the Civil Code, the parish in which he habitually resides and has his principal establishment, notice must be directed to him there, or sent to some post office within the parish, unless there be a post office nearer to his actual residence in an adjoining parish or State, in which case it may be directed to the latter, the domicile of the endorser being mentioned.

The rule of the commercial law, that a notice of protest must be sent to the post office nearest to the actual residence of the endorser, and that the holder must use due diligence to discover his domicile and the nearest post office, is, so far as it requires that the notice shall be sent to the nearest post office, subject to many exceptions, one of which is where the party to be notified is in the habit of receiving his letters at a more distant office, or by a more circuitous route, and that fact be known. The great object of the law is to give notice in as speedy and convenient manner as it can be done; and when there is a reasonable compliance with this rule it is sufficient.

It is not absolutely necessary that a notice of protest should be directed to an endorser at the post office nearest to his residence, where he receives his letters and papers from two offices, and the difference in their distance from his residence is but little. In such a case, a notice directed to either will be good.

In an action against the endorser of a bill, it was proved that he was in the habit of receiving his letters from two post offices, both of which were in the parish of his domicile, but one about a mile nearer to his residence than the other; that, supposing him to apply at the two offices every mail day, he would receive letters, if sent to him through the farthest office, from ten to eighteen hours sooner than if directed to the nearest; and that he had instructed the postmaster at the farthest office to retain all letters which might come to his office for him: *Held*, that a notice of protest directed to the endorser at the farthest office was sufficient.

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Where it is proved that defendant had declared "that his residence is the parish of S——," and, that, by the laws and regulations of the post office department, all letters directed to that parish, without specifying any particular office, are sent to a post office from which he was in the habit of receiving his letters, a notice of protest directed to him, as the endorser of a bill, at that parish, will be sufficient.

APPEAL from the District Court of St. Landry, King, J.

GARLAND, J. Two suits, which, by consent of the parties, were cumulated and tried together below, were instituted on eleven promissory notes, by the holders, against the drawers, and first endorser, Jacques Dupré. The first suit is on five notes, all dated the 24th April, 1842: one payable at four months, for \$2,400; one at six months, for \$4,000; one at eight months, for \$4,000; one at nine months, for \$4,000; and one at twelve months, for \$5,000; making the sum of \$19,400, with interest at ten per cent per annum on that sum, from the date of the notes until paid, and \$21 50 the costs of protest. The second suit is on six notes: one dated January 1st, 1842, payable at six months from date, for \$4,000; one dated January 12th, 1842, at four months, for \$4,000; one dated January 14th, at four months, for \$2,500; one dated January 18th, at four months, for \$2,500; one dated January 20th, at four months, for \$4,000; and one dated February 4th, 1842, at four months, for \$2,400; making a further sum of \$19,400, on which the plaintiffs claim interest, from the time the several aforesaid notes became due; also the sum of thirty two dollars and fifty cents costs of protest of said notes.

The drawers of the notes are not before us, and it is unnecessary to state the defence put in by one of them (Joubertie), as he is not a party to this appeal. The answer of Jacques Dupré, to the demand on the five notes of the 24th of April, 1842, is an acknowledgment that he endorsed them, but he alleges that he was induced to do so through error and fraud, as he supposed they were to be used in renewal of the six notes described in the suit no. 4218, between these parties. He further says, that said notes were not legally presented for payment at maturity and protested, and notice of their non payment given to him, as required by law. The answer to the suit on the six notes, is an admission of the endorsements, but a denial of the legal present-

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ment for payment of the notes at maturity, and protest thereof, and notice to the defendant, as endorser.

The evidence admitted on the trial proves, that previous, and up to the month of October, 1840, there existed in the town of Opelousas, a mercantile firm consisting of Dupré, Joubertie & Tinet, who did business under that name. It was dissolved in the last mentioned month, by the death of Tinet, when the other two partners continued the business in the name of Dupré & Joubertie. This firm opened on their books a liquidation account with that which preceded it. On the 24th December, 1840, a settlement of the accounts existing between the plaintiffs, and Dupré, Joubertie & Tinet was made, when it appears from the account filed, that a balance of \$18,541 63, was due to the plaintiffs. The account mentions outstanding notes of the firm, on which the plaintiffs are endorsers, to the amount of \$13,776 36, the nett proceeds of which, when discounted, were credited to said Dupré, Joubertie & Tinet, and with which they will be charged at maturity. This settlement was of accounts up to some time in the month of October, 1840, although made at a later period; and, among the notes represented as outstanding, were three drawn by the last named firm in liquidation, and endorsed by the defendant Jacques Dupré. The first is dated the 15th of October 1840, from which period to the 10th of August, 1841, the said defendant endorsed for Dupré, Joubertie & Tinet *in liquidation*, twenty four notes, amounting together to \$74,500, all of which it appears passed through the hands of the plaintiffs; and the evidence informs us that some others were given, which were sent to Dupré & Joubertie to be given up to their endorser. On the 9th of September, 1841, the defendant, Jacques Dupré, commenced endorsing for his co-defendants, Dupré & Joubertie; and from that time to the 6th of October, 1841, he endorsed, at different times, five notes, amounting to \$15,400, and from the 15th of November, 1841, to January 1st, 1842, five other notes, at different dates, amounting to \$15,400 more. On and from January 1st, 1842, to the 4th of February following, the six notes sued on in suit no. 4218, were drawn and endorsed, and were evidently intended as renewals of a note of Dupré, Joubertie & Tinet in liquidation, for \$4,000, dated August 10th, 1841, and

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the series of five notes of Dupré & Joubertie, commencing on the 9th of September, 1841, and ending on the 6th of October; but there were, on the 1st of January, 1842, five other notes of Dupré & Joubertie outstanding, amounting to \$15,400, which matured at different periods, in March and April, 1842. The firm of Dupré & Joubertie continued until some time in December, 1841, when it was dissolved, and the plaintiffs notified thereof soon after. On the 20th January, 1842, an account current was made out by the plaintiffs, with Dupré & Joubertie, and a balance struck against them of \$38,946 66. This account was sent to Dupré & Joubertie on the 22d January, 1842, who acknowledged its receipt on the 25th, and, without saying positively in their letter that it is correct, they promise to make remittances as fast as they can. From the evidence, it is further shown, that the plaintiffs begun to get uneasy about the large balance owing to them, and became pressing on Dupré & Joubertie to pay, or secure it; and, in the month of April, 1842, as we infer from a letter of Dupré & Joubertie's of the 24th of that month, and from the positive testimony of E. Bercier, Degelos, one of the plaintiffs, visited Opelousas, to have the business settled, or to institute a suit to recover the sum owing. What took place between Dupré & Dubertie and Degelos, appears no further than from what is said in the letter of the former, written by Dupré on the 24th of April. They say that, when Degelos, about eight days previously, was in Opelousas, they had promised him their notes, endorsed by Jacques Dupré, for the sum of \$19,400, being about the balance which they owed, deducting the \$19,400 of notes which had already been sent and endorsed by Dupré. That in compliance with this promise, they now send the notes, and ask the plaintiffs to have them discounted to secure the balance owing to them as far as they will go; but, as the discount is to be taken off these notes, they express a fear that the balance of their account will not be covered, and they ask for further time, promising to do all they can to settle that balance. They further express a wish, in case they cannot pay the notes first sent in full, that they may renew them, and they ask a continuance of the endorsements of the plaintiffs, after that of Dupré. The letter concludes by expressing a hope, that no suit will be

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brought against them, as they (plaintiffs) are nearly covered by notes endorsed by Dupré to the amount of \$38,800. In this letter were enclosed the five notes sued on, dated April 24th, 1842, payable at four, six, eight, nine and twelve months, amounting to \$19,400, each note bearing interest at the rate of ten per centum from date until paid. They were received in New Orleans, on the 26th of April, and their receipt acknowledged on the 27th, as is stated by the witnesses. This letter Joubertie says he never received or saw, nor did he know of the transmission of the notes on the 24th, by his former partner, Antoine Dupré, although he knew of many previously.

At various dates from the 15th to the 23d of May, four of the six notes given in January and February, 1842, fell due. As the time approached, the witnesses for plaintiffs say, that they became very uneasy at not hearing from Dupré & Joubertie, or receiving any funds to pay these notes, or new notes to renew them. The notes were held by different banks, none of which were making any new discounts. The other five notes were drawn payable at long periods, with ten per cent interest on their face, which prevented them from being used in bank, and the money market was very tight, so much so, that men of the best established credit, found it difficult to raise money on the best security. In this state of affairs, on the 8th of May, 1842, the plaintiffs wrote to Dupré & Joubertie again, acknowledging the receipt of their letter of the 24th April, and the notes enclosed in it, to about cover the balance of their account; "*pour couvrir approximativement la balance de votre compte chez nous.*" The letter then expresses great regret at not receiving notes to renew those about coming due, and a hope that they may still arrive in time, otherwise they will have to be protested. They then go on to say that, as to the notes sent in April, they have them in hand, but as their time of payment is so distant, they cannot be discounted in bank, therefore they will consider them as serving to settle their account. To this proposition Dupré & Joubertie seem never to have made any objection. This letter was sent by mail, and a duplicate by a steamboat. On the 10th or 11th of May, the plaintiffs, still not hearing any thing from Dupré & Joubertie, Bellocq, one of them, left New Orleans, and

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came with great expedition to Opelousas, bringing with him a triplicate of the letter of the 8th. He did not go to the store where Joubertie was doing business, but went to the dwelling house of Dupré, from whence Dupré sent for J. Bercier, who had been a clerk of Dupré & Joubertie before the dissolution of the firm, and was then in the employ of Joubertie & Vallain. When this witness arrived, he says that he was shown into the garden, where Antoine Dupré and Bellocq were. The former said that he wished him to go out to see his uncle, (the defendant,) and get him to endorse certain notes, and Bellocq told him, if the defendant objected, and should say he had endorsed notes already to renew those coming due, to convince him, or make him understand that it was not so—that those notes had been made for another purpose. Bellocq also requested witness not to let Joubertie know he was there, but no reason is given why he did so. Witness replied, that the business seemed to be somewhat entangled, and he would have nothing to do with it, and that he would not do any thing affecting Joubertie's interest, while he was in his employment, without letting him know it. The request to go, was pressed on the witness, but he again refused, when Bellocq turned to Antoine Dupré and said that he must go himself; and soon after he (Bellocq) set off on his return to New Orleans. Antoine Dupré never did go to get the endorsements required. Bercier told Joubertie of the matter, but what he said, or did, at the time does not appear, further than that he said he knew nothing about it. Bellocq reached New Orleans again on the 17th of May, and all the notes were protested. This, we believe, is a full statement of all the evidence which relates to the question of fraud in obtaining the endorsement of the five notes, dated the 24th April, 1842, and sued on in no. 4217, except the admission that Jacques Dupré is the uncle of Antoine Dupré, and that Joubertie married his grand daughter, and Vallain a niece of his wife.

The evidence in relation to the question of notice is, that the defendant, J. Dupré, has for more than twenty years resided always at the place he now does. During all that time a post office has existed at Opelousas, which is the seat of justice for the parish of St. Landry. It is the principal town in the parish,

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in point of population and business. It is the principal post office; all letters addressed "parish of St. Landry," come to the post office in Opelousas, and are, if the post master thinks it proper, sent to other offices; if not, they are kept there until called for. Mr. Dupré, up to the year 1837, always received his letters and newspapers from the office at Opelousas, and resided much nearer to it than to any other office. In that year a post office was established at Washington, a village about six miles from Opelousas, which is, in point of population, proved to be next to Opelousas. It is the principal *landing*, or shipping port for the produce of an extensive section of country, and the merchandize and supplies for the country are debarked there. It is near the road from the residence of Mr. Dupré to one of his plantations; he is frequently there, and often receives his letters from that post office; has got them himself, and sometimes through other persons. The office at Washington was discontinued some short time after it was first established; and in the year 1838, or 1839, re-established, and has been in existence ever since. The post master at Opelousas testifies, that Mr. Dupré often gets his letters from his office, and has instructed him, when they come not to give them to any one but to himself or his servant. He is frequently in the town of Opelousas, and when Dupré and Joubertie were doing business made their store "*his head quarters*." He is a well known citizen, having been for many years in one branch, or the other, of the legislature. It is further shown, that the mail from New Orleans is due at Opelousas on the day of its arrival, at 6 P. M., and that it often arrives before, sometimes at 10 A. M. It remains there until the next morning, generally until dawn of day or sunrise; and it takes an hour or more to carry it to Washington. The road from Opelousas to Washington runs from south to north, nearly straight; the residence of Dupré is to the west of it, and makes an angle, the road being the base of it. A great deal of testimony has been given to prove which post office is the nearest. Some witnesses consider the distance very small, though all say Washington is the nearest. Some are of opinion, not more than four or five hundred yards; others say it is one mile and a half. The roads to both places are practica-

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ble, and generally good at all seasons of the year. A surveyor measured the distance from the two places, and found the difference a little over a half mile in favor of the Washington office. He followed, for a part of the distance, an old road to Dupré's, not much used. Another witness measured it also, and pursuing the public road from Opelousas to the point where the road to Dupré's house leaves it, he made the difference a fraction over a mile in favor of the Washington office. The average made from the testimony of all the witnesses makes the difference in favor of the Washington office nearly a mile. One witness says that he rode on horseback from Opelousas to Dupré's house, and from thence to Washington; that he timed himself, and kept as regular a gait as he could, and it took him fifteen minutes more to travel the first distance than the second. The evidence further shows, that Mr. Dupré sometimes took his letters out of the post office at Washington himself, and had also authorised a person there to receive letters for him, and deliver them to him, or to send them by his servant. Many letters came for him by steam boats, and most of his correspondence with New Orleans, it seems, was carried on by that mode, but it is not shown that they carried the mail.

It further appears that the notaries in New Orleans made inquiries as to the place where the notices of protest should be sent, and, in most instances, were told by one or the other of the plaintiffs, that Opelousas was the proper place. Two of the notaries testify that they made inquiries of other persons well known to Mr. Dupré, one of them his agent and factor in the city, who said his residence was in the parish of St. Landry, and one of them says Mr. Dupré so told him in person.

All the notes described in suit no. 4217, and one for \$4000, dated the 12th day of January, 1842, and due four months after date, described in no. 4218, were protested by Wm. Christy, a notary public, in New Orleans. Some defects were supposed to exist in his official protests, and his testimony was taken to prove demand of payment, and notice to the endorser. It was then discovered that he had not, himself, made a demand of payment, in person, of any of the notes, but that the demands had been made by one or the other of his clerks, that a protest

had been made out on their report, that a notice, signed by Christy, as notary, was then deposited in the post office by a clerk in due time, directed to the endorser, at Opelousas, or to the parish of St. Landry. Another of the notes, described in suit no. 4218, was protested by Mazureau, a notary, who states that he went to the place where the note was made payable, to wit, the counting house of the plaintiffs. He found no one there. He waited a short time, and left. He met a clerk of plaintiffs' in the street, and spoke to him about the note; he then went to his office, when he either sent for Degelos, one of the plaintiffs, or found him there, presented the note, and was informed that no funds had been provided to pay it. All the other notes were presented for payment by the notaries protesting them in person, the demand refused, and notice made out and put in the post office in New Orleans by said notaries in person, directed to the endorser at Opelousas, or to the parish of St. Landry; and on those notes which purport to have been made in New Orleans, a notice was also put into the post office there, directed to the endorser in that city.

It is further proved, that about the 20th, or 22d of May, 1842, a short time after some of the notes were protested, the defendant, J. Dupré, called at the counting house of the plaintiffs, and inquired how it was that the notes of Dupré & Joubertie, on which he was endorser, had been protested, as he had a short time before endorsed other notes to renew them. Some conversation took place, and Bellocq, one of the plaintiffs, told him he was mistaken in supposing that he had endorsed notes to renew those then falling due, and showed him the letter of Dupré & Joubertie, of the 24th April, 1842. Dupré looked over it, and said, as to the first series of notes described in suit no. 4218, that he would pay them, but that he would not pay the others unless they could make him do it; and soon after he published an advertisement in the papers, warning all persons against taking the five notes, dated 24th April, 1842, in payment, or accepting a transfer of them.

The district judge gave a judgment for the plaintiffs, for \$5000, against the endorser and against Dupré & Joubertie, for the amount of the notes dated the 14th and 18th of January,

1842, and payable on the 17th and 21st of May; and on the remainder of the notes, as well as on those two, gave judgment in their favor against Dupré & Joubertie, and in favor of Jacques Dupré, the endorser; from which last judgment the plaintiffs have appealed, and the appellee, J. Dupré, asks us to correct it, by disallowing the sum of \$5000 and interest, and giving an absolute judgment in his favor.

The question of fraud in obtaining the endorsement on the five notes dated 24th April, 1842, is the first we shall consider; and a most attentive consideration has been given to the evidence in relation to it. The record is perfectly silent as to the means by which Antoine Dupré induced his uncle to endorse those notes. It does not appear that Degelos, who was in Opelousas some eight days before their date, was a party to any improper or fraudulent means to procure the endorsements; nor that he advised any thing that was illegal or dishonest. The visit of Bellocq in May, and his remarks to Bercier in Antoine Dupré's garden, are the principal reliance of the counsel to establish the fraud and collusion in relation to these notes. But it must be remembered that previously to that visit and those remarks, the notes had been executed, endorsed and sent to New Orleans by Antoine Dupré, acting for his late firm; and in his letter he tells the plaintiffs that the notes are not executed for the purpose of renewing the others, then held by various banks, but for the purpose of having them discounted, and discharging the balance owing to the plaintiffs, on the account current stated in January previously. In this same letter the other series of notes are mentioned, and a hope expressed, that if they cannot be paid in full they can be renewed, and the continuance of the endorsement of plaintiffs is asked to secure that object. It is a well settled principle of our jurisprudence that fraud cannot be presumed.

It cannot, in general, be proved by direct and positive evidence, but the circumstances that go to establish it should be strong, consistent and calculated to induce a reasonable mind to believe that some dishonest and fraudulent intent existed.

There is another principle as well established as the first, that if a party obtain an endorsement to a note by fraud in

himself, and transfers that obligation to an innocent person, without notice, for a good consideration, in the usual course of business, that person can hold it and enforce the payment, unless some fraud or collusion can be proved as to him.

So it may be admitted that the endorsement of Jacques Dupré was obtained by the fraud of Antoine Dupré, yet if the plaintiffs were not participants in that fraud in any way, the endorser is as much bound to pay them the amount of the notes as if his endorsement was honestly obtained.

Jacques Dupré, in putting his endorsement on the notes, and delivering them to Antoine Dupré, trusted him, and if he was deceived it was his own act and imprudence, and an innocent person cannot be made to suffer for it.

That J. Dupré had great confidence in his nephew, and trusted greatly in his integrity and prudence, is shown by the fact, that there are in the record, notes endorsed by J. Dupré, for him and his partner, from the 15th October, 1840, to the 24th April, 1842, a period of about eighteen months, to an amount exceeding \$144,000; besides which, the witnesses state that a number of notes were returned to Dupré & Joubertie after being taken up, but to what amount is unknown. That all these notes were not necessary to renew the first five or six, amounting to \$19,400, is apparent from an examination of them, and the record shows that, at the date of the six notes sued on in suit no. 4218, there were in circulation five other notes amounting to \$15,400, endorsed by Mr. Dupré, which fell due in March and April, 1842; and what is still more remarkable, these five notes correspond precisely in amount with five of the others sued on, and also with the first five notes endorsed by Mr. Dupré in October, and November, 1840. These facts go strongly to show, if there was a fraud practised in obtaining the endorsement on the five notes in question, that it was not the first time it was effected, as it is evident that there were two series of notes out long before those in controversy are dated.

Before proceeding to an examination of the question of the legality of the protest and notice, our attention has been called to a bill of exceptions, taken by the defendant, J. Dupré, to the admission by the judge, of the depositions of the notaries public who demanded payment of the notes and protested them.

The first objection is, that the notaries whose depositions are offered were the same persons alleged to have protested the notes sued on, and that, as such, their parol testimony cannot be admitted "*to explain, to eke out, to perfect, or to contradict* their official acts." If the testimony offered was, in fact, received for the purposes above stated, or any one of them, we should not hesitate to say, that the judge erred in admitting it; but we do not understand that it was the object of the counsel for the plaintiffs to use the depositions for any one of the purposes mentioned. It seems from the course pursued on the trial, that the counsel for the plaintiffs wished to make sure of their case, and, therefore, offered the protest and proceedings of the notaries in evidence. If they were regular and legal, and established, according to the statute of March 13th, 1827, a presentment of the notes for payment, and a legal notice to the endorser of a protest for non-payment, then that part of their case was made out; but if it should turn out that the proceedings of the notaries were imperfect, and did not make out their case, then the plaintiffs proposed to make use of their evidence as individuals to prove a demand of payment and notice to the endorser, abandoning the mode of proof authorized by the statute, and falling back on the commercial law, which, we think, they had a right to do. In the 16 La. 286, we said that it was not indispensable that a demand of payment should be made, and notice given, by a notary public. This is a mode of making a demand and giving notice *authorised* by the statute; but we do not conceive that the mode authorised by the commercial law is dispensed with, or repealed. The statutory provision is cumulative, not prohibitory. If the plaintiffs choose to rely on the acts of the notaries as such, they cannot go beyond them and help them out by parol testimony, nor can they use a part of their official acts to make out one part of their case, and make out another part by the parol testimony of the notaries, as to any thing required by law to be inserted in their acts; but of any fact not required by law to be so inserted, a notary is as competent to testify as any other person.

The second ground of objection is, that the notaries are interested in the event of this suit, and, therefore, incompetent;

and reliance is placed on our decision in the 17 La. 386. That decision is, that a notary cannot testify as to any thing which will contradict or strengthen his official acts; but where his act is laid aside, and reliance is placed on his acts to establish a right, we think he can be used as a witness. We cannot see that the notaries examined are directly interested in this case. If any liability may have been created by their acts, that interest is contingent, and is to be considered in weighing their testimony. In the case referred to the notary was himself a party to the suit, which excluded him, if there had existed no other reason.

The third ground of exception, it appears to us, is answered by what we have said upon the first. If the written instruments of the notaries are imperfect and not according to law, then they are not the best evidence that can be procured. On this hypothesis of the counsel the testimony was admissible.

The fourth objection is, that "the interrogatories of the plaintiffs contain leading questions." The plaintiffs have propounded interrogatories to some seven or eight witnesses; to some of them nearly, or quite, a dozen questions are submitted, and altogether nearly one hundred questions are asked. To notice so general an objection as the one taken would impose an almost endless task. No particular question is selected as objectionable, and under so general an exception we cannot pass on the various interrogatories. We are, therefore, of opinion that the judge did not err in receiving the depositions. As a matter of practice it was probably a right which the defendant's counsel had to call on the counsel of the plaintiffs, to state whether they relied on the notarial acts or the depositions to establish their case, so as to enable them properly to direct their defence; but as this course was not pursued it is not necessary to decide that question.

The defendants' counsel have further urged that, as the legislature have pointed out a mode of making protests and giving notices to endorsers, it excludes all other modes, and that protests and notices must be official acts. As to promissory notes and domestic bills of exchange we cannot assent to the argument. This court has long held the opinion, that the acts

of 1823 and 1827, empowering notaries, parish judges, and, in some cases, justices of the peace, to protest and give notices of protest of bills and notes, have not introduced any new rule as to demand of payment, or what constitutes it, nor as to the diligence to be used in giving notice, but merely introduce a mode of proof not known to the commercial law. 6 La. 730. 7 *Ibid*, 11.

The protest of a notary, for non-acceptance, or non-payment, of a domestic bill of exchange, or promissory note, and his certificate of notice to the endorser, is not received as evidence in any court in any commercial country, unless there be some statute or local law authorising it. The act of 1827 requires (so far as it goes), the notary to do precisely what the holder of the bill or note was required to do under the commercial law, and authorises him to certify it as an officer. This act is received as evidence, and stands in the place of the parol testimony which had to be made before the statute was enacted.

The protests and notices it is said are not in the legal form, and our attention has been called to them particularly. We do not deem it necessary to go into such an examination, as we have laid all the protests out of view, and have formed our opinion upon the depositions given by the various notaries testifying as witnesses. The notes presented for payment by Boudousquie, Ducatel and Pollock, were presented by them as agents of the Citizens' Bank, the Consolidated Association, and the Louisiana State Bank, respectively; they were the property of those institutions; and each witness says that he presented the note entrusted to him, in person, for payment at the place fixed in it. The replies to the demands are given, and the mode of notice stated. Each witness says that he signed the notice himself, and deposited it in the post office in New Orleans, in person, on the day of the protest, directed to the defendant, Jacques Dupré, at Opelousas, or to the parish of St. Landry. Mazureau says that as agent of the Union Bank, he took one of the notes entrusted to him, and went with it to the place of payment, as stated on its face, on the day it was payable; that he found no person in the counting house or office of the plaintiffs, upon whom he could make a demand of payment. That he waited a short time, and, no one coming in, he returned to his office, and after-

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wards sent his clerk to make a demand of payment, who returned him the note unpaid. The witness then saw Degelos in his (witness') office, and he there demanded payment of him, when Degelos said, that no funds had been provided to pay it. He then made out a notice of protest directed to the defendant, Dupré, at Opelousas, Louisiana, which he deposited in the post office in New Orleans, on the day of said demand and protest. Each of these persons states what means and acts of diligence he used to discover the residence of the endorser. All the other notes went into the hands of Christy, as the agent of the Bank of Louisiana; and as it is proved by the depositions of his clerks, that he did not, in person, present any of the notes for payment, although he so states in his official protest, we put out of view his deposition, and proceed to consider the case upon the depositions of Rareshide and Wm. H. Christy. These witnesses state, that the notes shown to them, and which are a part of those sued on, were handed to them, or to one of them, by William Christy, to be presented for payment at the place mentioned on the face of the notes, to wit, the counting house of the plaintiffs. They each say that, with the note or notes so entrusted respectively to them, on the day of payment, they went with the note, and presented it, and they report the name of the person to whom it was presented, and the reply, with the hour of the day. They then returned to the office where they were employed, and notices to the endorser were made out and signed by William Christy, as notary, directed, in each instance, to the endorser at Opelousas, Louisiana, and, where the note or notes purported to be dated in New Orleans, a notice to the endorser, directed to him in that city, was also deposited, with the notices to Opelousas, in the post office in the city on the day of the protest. These individuals also state what means and diligence they used to ascertain the residence of the endorser.

Leaving out of view, for the present, the question, whether the notices should have been directed to Opelousas, or Washington, we shall proceed to consider whether or not the proceedings of these various individuals in relation to the presentment of the notes for payment, and the mode of giving notice, was sufficient. The notes presented by Boudousquie, Ducatel and Pollock stand

precisely on the same ground. They were the agents of the various banks, that held the notes. A presentment for payment by an agent for the holder is sufficient, and so is a notice given by an agent to the endorser sufficient to bind him. A presentment and notice by an entire stranger to a bill or note would not, perhaps, be sufficient; but we have no doubt, that such presentment by, and notice from any one authorised to receive the money is sufficient. Story on Bills, no. 303. Chitty on Bills. 1 Hill's N. Y. Reports, 11, 263. The correct doctrine seems to be, that any person, in whose possession the bill lawfully is for payment, may give notice of dishonor. Story on Bills, no. 292.

Boudousquie, Ducatel and Pollock therefore were all competent to receive payment, and, in case of refusal, to give notice to the endorser. Upon the same principle, Mazureau and Christy were also competent to do the same things. In the case of corporations it is not practicable to present for payment, and to give notice of dishonor, in any other mode than by an agent. The only particular in which the note in the hands of Mazureau differs from the others, is in the fact, that when he went to the counting house of the plaintiffs to demand payment, he found no one there. It was during the usual business hours. He says that he waited a short time, and that, no one coming, he went away. Had this been the presentment of a bill for acceptance, we feel satisfied it would not be sufficient; and did it stand by itself as a presentment for payment, we should doubt if it would be sufficient; but the note was sent again by a clerk, and by him returned unpaid, and soon after a demand was made on Degelos, which, although not at his counting house, may be taken into consideration, together with his reply, as a circumstance to show that the note would not have been paid had Mazureau waited longer, or some person been present when he called, and, therefore, no injury resulted to the endorser.

The next question is, whether the presentment of the notes for payment by Rareshide and Wm. H. Christy, the clerks of William Christy, be sufficient, and the notices issued in consequence of the non-payment legal and sufficient to bind the endorser. The notes were entrusted to William Christy, as agent, by the Bank of Louisiana, for the purpose of demanding pay-

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ment and giving notice to the endorser. That institution clearly had a right to appoint him its agent, and he had a general authority to do all that was necessary to effect the object. He had authority to appoint a substitute, for whom he was answerable. This clearly authorised Rareshide and Wm. H. Christy to receive the amount of the several notes entrusted to them, and, if they had been paid and the notes given up, we have no doubt it would have been a good payment. They are, therefore, not strangers to the notes, and a presentment by them for payment was good. The notices were made out by Christy, and deposited in the post office by the said clerks, or one of them, as they testify. We suppose there can not be a doubt, that if a note or bill were sent from New York or Boston, by the owner there, to his correspondent or agent, a merchant in New Orleans, that such note or bill might be presented for payment by a clerk of the agent, and, upon his report of the bill not being paid and return of it to his employer by the clerk, that the employer might write a letter notifying an endorser of the non-payment, which might be deposited in the post office by the clerk, and thus bind the endorser. This being true, we are of opinion, that William Christy had a right to make out a notice, and a legal deposit of it in the post office in New Orleans is so far binding on the endorser. Story, in his treatise on Bills, pp. 340-1, says, that the notice must in general come from the holder, or his agent, for notice by an agent is equivalent to notice by the principal; or it may come from some one holding the bill, and interested in having notice given.

We now come to the last question in the case, which is, whether the notices, which were all directed to Jacques Dupré at "Opelousas, Louisiana," or to him, "Parish of St. Landry," be sufficient to bind him; or whether it was indispensable that they should have been directed to him at Washington, because that was the nearest post office to him, and he received a portion of his letters and papers there.

Under some circumstances, the question of notice is one of law and fact; but when there is no dispute about the facts, it is a question of law alone, and the court is the proper tribunal to decide it.

The rule of the commercial law in relation to the notice being sent to the endorser at the place of his usual residence or domicil, is precisely the same with our statute of 1827. According to the Civil Code, art. 42, the domicil of each citizen is the parish in which he makes his habitual residence and has his principal establishment. The parish of St. Landry is, therefore, the domicil, or residence of the defendant, J. Dupré. The notice must therefore be directed to him there (3 Robinson, 164), or sent to some post office within the parish (16 La. 308), or, if there is a post office nearer in an adjoining parish or State, it may be sent there, the domicil of the endorser being mentioned.

It is also a rule of the commercial law, that the notice of protest must be sent to the post office nearest to the actual place of residence of the endorser, and that the holder of the bill or note shall use due diligence to discover the place of domicil and the post office nearest to him. But the rule that the notice must be sent to the nearest post office, is not one of universal application, nor unbending; it is subject to many exceptions, one of which is, if the party is in the habit of receiving his letters at a more distant office, or by a more circuitous route, and that fact be known; in such case a notice sent by that route, or to that office, will be good. The late work of Judge Story on Bills of Exchange treats at considerable length on these questions; and the decisions in different courts in this country and England show numerous exceptions to the general rule.

The fact is, that almost every case must depend upon its own circumstances, and, however desirable it may be to have some fixed rules, the numerous transactions of men founded on, or connected with bills of exchange and promissory notes, make it almost impossible to adopt any to which numerous exceptions must not be made. The great object of the law is to give the party notice in as convenient and speedy a manner as it can be done; and when there is a reasonable compliance with this rule, it ought to be sufficient to excuse the holder, and bind the endorser.

But the main question in this case is, whether, when the party receives his letters and papers from two offices, it is absolutely necessary that the notice should be sent to the one nearest to

him, however small the difference in the distance may be. The counsel for Jacques Dupré contend that this doctrine is clearly settled by the decisions of this court; and they cite two decisions reported in 3 Robinson, pp. 4 and 242, and the case of *Becnel v. Tournillon*, 6 Robinson, 500. The Supreme Court of the United States, in 1 Peters, 578, and 2 Peters, 543, have decided that, in such a case, a notice directed to either office is good. The Supreme Court of Pennsylvania have adopted the same rule; and the Supreme Court of New York, after overruling one of its previous decisions, have decided the same way; and its judgment has been affirmed by the Court of Errors.

Judge Story also adopts the same principle, in his treatise on Bills, no. 297. We have said that all rules in relation to these questions must be reasonable, and must not be pushed to extremes. If we were to adhere rigidly to the principle held by this court in the cases cited from 3 Robinson, it might soon lead to very ridiculous results. The difference of distance between two post offices and the residence of the endorser, is often very small; and the decision of a case, and the rights of a party might be determined by a difference of a few yards or feet, or by the accuracy of a surveyor's chain, instead of upon the principles of justice, and common sense.

The evidence in the case of *The Mechanics and Traders' Bank v. Compton* (3 Robinson 4), is not stated in the opinion. We have, therefore, referred to the record, and find it was proved that Walker, the endorser, was in "*the habit*" of receiving his letters and papers from the Cotile post office, which was three miles, or more, nearer to his residence than Alexandria, where it is proved there was a post office in which he had a box, and where he also received letters and papers; but it was not proved to have been *habitual*. As to the case of *Nicholson v. Marders*, 3 Robinson 242, we have not the record before us, but our recollection of the facts is, that there was no post office in the parish of Concordia, but that the two nearest to the defendant were Natchez and Rodney in Mississippi. The greater number of the witnesses testified that Rodney was much nearer to defendant than Natchez; and the one or two, who testified to the latter place being the nearest, came to the conclusion from the fact

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that there were two roads, one of which was across a bend of the river, whilst the main route was longer.

The case of *Becnel v. Tournillon* is entirely different from either of the others and the present. The protest in that case was made in the parish of St. John the Baptist. The defendant resided in the parish of Assumption. One notice was directed to him at Donaldsonville, which is in the parish of Ascension; another was directed to him in the parish of Assumption generally, and the evidence showed that it went to the post office at the court house, which was seven or eight miles distant from the the defendant's residence, and that there was a post office in a village called Paincourtville, within three miles of the defendant's residence, and between him and the court house. The mail had to pass this office to get to the court house. An attempt was made to prove that the defendant got his letters and papers from Donaldsonville, six or seven miles distant, but it failed; and no evidence was given to prove that the defendant ever got a letter from the court house office. Under these circumstances we held that the rule of directing the notice to the nearest office must prevail.

From these statements it will be seen that there is a wide difference between the facts of the case relied on and those of the present case, and we must be governed by them.

In the case of the *Exchange Bank v. Boyce* (3 Robinson, 306), it was proved that, for about one half of the year, defendant resided in the pine-woods, near to the Cotile post office, and for the remainder near Alexandria; and we held that a notice directed to him at either place would be good. In *Mead v. Carnal* (6 Robinson, 73), the evidence was that Boyce resided much nearer to Cotile than to Alexandria, but there was no proof that he received any letters from the former office, and it was proved that all his letters and papers came to Alexandria, and that he had a box in the office there. We held that a notice directed to Alexandria was sufficient to bind him. Again, in the case of *The Bank of Louisiana v. Watson* (15 La. 38), the evidence was, that there was an office nearer to the defendant than Baton Rouge, but that he had a box in the office at that place,

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and had instructed the post-master to keep all his letters and papers there. We decided that a notice left there was good.

In this case the difference in distance from the two offices to the defendant's residence is about a mile, and the routes to each are good throughout the year. Letters arriving from New Orleans for J. Dupré, would, by the ordinary course of the mail, reach him, by stopping at Opelousas, from ten to eighteen hours sooner, if he sent or went to the post office on mail days, than if directed to Washington. The post-master had instructions not to deliver letters or papers to any but to J. Dupré or his servant, which we consider a prohibition to that officer to forward them to any other place, which he might have done under his custom of sometimes forwarding letters to individuals, when another post office was nearer to them. Besides this, it is proved that J. Dupré said that his residence was the parish of St. Landry, when asked by one of the witnesses in New Orleans. His agent and factor also gave the same information, and the post-master says that all letters to the parish of St. Landry uniformly come to the office at Opelousas, which is in conformity to the laws and regulations relating to the Post Office department, which laws it is our duty to notice.

The principle decided in the cases in 3 Robinson, pp. 4,242 has, we think, been carried far enough; and as Opelousas is the principal post office in the parish and the seat of justice, and as the difference between the two places is so small, we must consider the notice directed to that place as sufficient.

The judgment of the District Court is, therefore, annulled and reversed, and it is ordered and decreed, that the plaintiffs, Follain, Bellocq & Degelos, do recover of the defendant Jacques Dupré, the sum of thirty eight thousand eight hundred dollars, with interest on nineteen thousand four hundred dollars, part thereof, at the rate of ten per cent per annum, from the 24th day of April, 1842, until paid, and interest on a further sum of nineteen thousand four hundred dollars, at the rate of five per cent per annum, from judicial demand, to wit, the 26th day of the month of October, in the year 1843, until paid, and the costs of suit in both courts.

Magill, Swayze and Benjamin, for the appellants.

Voorhies, T. H., and W. B. Lewis, contra.

The Police Jury of St. Landry v. Fontaine and others.

**THE POLICE JURY OF THE PARISH OF ST. LANDRY V. RENE FONTAINE
and others.**

Plaintiffs, alleging that a servitude exists on the lands of the defendants, by the terms of the original grant under which they hold, by which the owners are bound to construct and keep in repair forever a certain bridge and road, obtained a judgment, declaring the servitude to exist, and ordering the defendants to keep the bridge and road at all times in repair. There was no allegation in the petition or answer, as to the value of the servitude: nor were any damages claimed or proved. On an appeal by defendants: *Held*, that there being nothing to show that the court has jurisdiction, the appeal must be dismissed.

APPEAL from the District Court of St. Landry, King, J.

T. H. Lewis, for the plaintiffs.

Voorhies, for the appellants.

GARLAND, J. The plaintiffs allege that the defendants are the owners of a tract of land, on which a servitude exists, by the terms of the grant, to keep up a certain road and bridge forever. It is said that the obligation has not been performed, and the prayer is for a specific performance. The answer denies the existence of the servitude, and further says that if it ever existed, it has been released or discharged. The evidence shows that, during the pendency of the suit, the defendants constructed the bridge and repaired the road, yet there was a judgment ordering them to do both, and to keep them forever after in repair. From this decree they have appealed.

There is no allegation in the petition or answer as to the value of the servitude claimed. No damages are alleged, nor proved. In fact, there is no pecuniary demand of any kind; and we have no information as to the value of the matter in dispute. The appeal bond is only for the sum of one hundred and fifty dollars. There is nothing to show that this court has any jurisdiction, and the appeal must be dismissed.

Appeal dismissed.

Evins v. Murphy and another.

THOMAS EVINS v. JOHN B. MURPHY and another.

Where the clerk of the court from which an appeal has been taken certifies, in his answer to a *certiorari*, that several pages of the note of the evidence, made by the judge to serve as a statement of facts, have been lost, so that the record cannot be completed, the case will be remanded for a new trial.

A case will not be decided on its merits, unless the record contain all the evidence upon which it was tried below; and where it is not the appellant's fault that the record is incomplete, he will be entitled to relief.

APPEAL by the plaintiff from a judgment of the District Court of St. Mary, *Boyce, J.*

MURPHY, J. A *certiorari* was issued in this case at the last session of this court, on the appellant's suggestion that the record was not complete. The deputy clerk of the court below certifies to us that, as appears by the certificate of the judge who presided on the trial appended to the note of evidence taken down by him to serve as a statement of facts, there were six pages of said statement of facts, but that after diligent search not only in the files of the suit but in his office, he has been unable to find the first, second, third and fourth pages of said statement of facts. This court has repeatedly said that they would not pass upon the merits of a cause unless the record contain all the evidence upon which it was tried below. Where it is not the appellant's fault that the record comes up in such a shape as to preclude an examination of it, he is entitled to some relief. Thus in the case of *Porter v. Dugat* where the judge below had mislaid his notes, and, consequently, was unable to make out a statement of facts, the case was remanded for a new trial, on the ground that the appellant cannot be deprived of his right of appeal without his fault. 9 Martin, p. 121. It appears to us that the appellant in this case is entitled to the same relief. He should not suffer from the negligent manner in which it appears that the papers of the office were kept by the predecessor of the present clerk. The evidence missing is represented as important. Justice, in our opinion, requires that the case should be remanded for a new trial.

Rouly and others, Heirs, v. Bérard, Administratrix.

It is, therefore, ordered that the judgment of the District Court be reversed, and that this case be remanded, to be proceeded in according to law.

Splane, for the appellant.

Crow, T. H., and W. B. Lewis, contra.

JOSEPH ROULY and others, Heirs of Antoine Rouly, deceased,
v. HORTENSE BERARD, Administratrix of the Succession of
Frederick Duperier, deceased, and Tutrix of his children.

Payments to the creditors of a succession, made without an order from the Court of Probates, are irregular; but when they exonerate the estate from legal charges, and thereby benefit the heirs, the latter must show that such charges are unjust, unfounded, or excessive, or the payments will be allowed to the party by whom they were made.

Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost or destroyed.

Evidence, though improperly admitted, will be disregarded, where it could not have operated to the disadvantage of the party who objected to it.

APPEAL from the Court of Probates of St. Martin, *Briant, J. Magill*, for the appellants.

Voorhies, for the defendant.

BULLARD, J. The heirs at law of the late Antoine Rouly prosecute the present action against the estate of Frederick H. Duperier, deceased, to recover the amount of Rouly's succession, which, they allege was administered by said Duperier without legal authority, and as an intermeddler. The defendant filed with her answer, as full a statement of the affairs of the deceased as was in her power, and claims allowance for certain sums paid by the deceased, Duperier, for funeral expenses, medical attendance, and other small charges.

The evidence does not show that any thing more came into the hands of Duperier than the effects set forth in an inventory made by a justice of the peace, belonging to Rouly, independent of the firm of Rouly & Nauté, who kept a billiard table and grog shop. The effects which belonged to that establish-

Rouly and others, Heirs, v. Bérard, Administratrix.

ment are not shown to have come into the possession of the deceased. The amount of the inventory was \$196 06.

The judgment rendered by the Court of Probates charge Duperier's estate with that amount only, and credits it with the amount disbursed for medical attendance and funeral charges, and gives judgment for a balance of \$87 06½

It has been contended in this court by the heirs of Antoine Rouly, who appealed from that judgment, that the allowance was improperly made, because the payments were made by Duperier without any order from the Court of Probates. It is true, such payments are irregular, but when they liberate the estate from a legal charge, and thereby benefit the heirs, the latter ought to show that they are unjust, unfounded, or excessive. The evidence in the record does not satisfy us that the judge erred in making the allowance.

The bill of exceptions by the plaintiffs' counsel to the introduction of parol evidence to show an appointment of curator, was, in our opinion, well taken, and the court erred in admitting it, without its being first shown that the record had been either lost or destroyed. But the admission of it, in this case, does not appear to have operated to the prejudice of the plaintiffs. If it had been shown that Duperier had been appointed curator, his estate might have been made liable for all the property shown to have belonged to Rouly, whether in his own right or as partner of Nauté. Without any evidence of such appointment, whether another was appointed or not, he is liable only for such property as he is shown to have possessed himself of belonging to the estate.

Judgment affirmed.

The Union Bank of Louisiana v. Daniel and others.

THE UNION BANK OF LOUISIANA v. JOHN L. DANIEL and others.

In an action against the endorsers of a note, the notary's certificate, offered in evidence, recited that he had notified the protest à MM. H. D. et F., *aux Opelousas, endosseurs du billet, au moyen de six notices écrites adressées auxdits H. D. et F., respectivement; trois desquelles, adressées comme dit est, j'ai mises à la poste à V.,*" etc. Held, that the certificate must be construed to mean that three of the notices of protest were deposited in the post office at V., addressed to the endorsers at Opelousas; and that the proof of notice is sufficient.

APPEAL from the District Court of St. Landry, *Boyce, J. Voorhies*, for the plaintiffs.

Overton, Martin and T. H. Lewis, for the appellants.

SIMON, J. Three of the defendants, sued as endorsers of a promissory note, subscribed by their co-defendant, Daniel, for \$960, to the order of George Hill, and made payable at the office of discount and deposit of the Union Bank of Louisiana, at Vermillionville, the drawer's elected domicile, are appellants from a judgment which makes them liable, as such endorsers, to pay the amount of said note, *in solido*.

The only question which this case presents is, whether the endorsers were duly notified of the dishonor of the note; and on referring to the notary's certificate of notice, we find that he states: "Je, soussigné, etc., certifie avoir aujourd'hui, vingt-quatre Fevrier, 1843, notifié le protêt qui précède à MM. George Hill, Dupré & Joubertie, et Frémont, Guidry & Roy, *aux Opelousas, endosseurs du billet transcrit en tête dudit protêt, au moyen de six notices écrites, adressées auxdits George Hill, Dupré & Joubertie, et Frémont, Guidry & Roy, respectivement; trois desquelles adressées comme dit est, j'ai mises à la poste à Vermillionville,*" etc. le tout en présence des témoins," etc. This is clearly sufficient. The purport of the certificate cannot have any other meaning but that three of the notices of protest, addressed to the endorsers at Opelousas, were deposited in the post office at Vermillionville, *addressed as aforesaid*, that is to say, addressed to the said endorsers at Opelousas; and it is not pretended that they, or either of them, reside in any other parish, or that the notices were not sent to the post office nearest to their respective residences. With regard to one of them, Dr. George Hill,

Gradenigo, Tutor, v. Hicks.

the evidence shows that he lives within the limits of the corporation of Opelousas, that the post office at Opelousas is the nearest to his residence, that he receives his papers and letters there, that he lives about a mile from the town, and that the next nearest office to his house, after Opelousas, would be that at Washington, six miles off.

Under the certificate of notice, and the circumstances of the case, we think the notices were properly forwarded; that they must have reached the endorser in due time; and that they were correctly made liable to pay the notes sued on.

Judgment affirmed.

JOSEPH GRADENIGO, Tutor of Honoré Robb, v. RACHEL HICKS.

Though an appeal be taken by defendant merely for delay, no damages can be allowed unless prayed for by the appellee.

APPEAL from the District Court of St. Landry, *King, J.*

Martin, for the plaintiff.

Linton, for the appellant.

SIMON, J. This suit is brought upon a promissory note, made payable to one Lethy Martin, subsequently deceased, and to whose only child and heir the plaintiff alleges that he has been duly appointed tutor.

The only defence set up is the general issue, and a special denial that the plaintiff is the tutor of said child. There was judgment below in favor of the plaintiff, and the defendant has appealed.

No proof was adduced of the execution of the note, which was subscribed by the defendant's ordinary mark; but it was shown that said defendant acknowledged to the plaintiff's attorney, who had the note in his possession for several months, that it was given for money lent and still due, and that she, the defendant, had never returned a dollar of the money borrowed from the deceased. She pretended to be entitled to some deduction from the note for services rendered to one of the children of the deceased, but did not mention the amount of her claim

Lainé v. Balqué.

for attention to said child. The tutorship was also duly established. It is not pretended that the deceased had any other heir but the plaintiff's ward, and we are unable to discover what relief the appellant expected to obtain at our hands from her appeal, which appears to us to have been merely intended for delay. Had the appellee claimed damages for a frivolous appeal, we might, perhaps, have allowed them to a certa inextent.

Judgment affirmed.

CHARLES LAINE v. JOSEPH BALQUE.

APPEAL from the District Court of St. Landry, King, J.

Swayze, for the appellant.

Martin, for the defendant.

BULLARD, J. This is an action on a promissory note for \$370, against the drawer, who answers that he owes the plaintiff nothing, having paid him fully every dollar which he ever owed him.

The plaintiff is appellant from a judgment against him.

The evidence in the record, which was admitted without objection, shows very clearly, that the plaintiff had been employed for two years as a teacher in the defendant's family, the first year at \$120, and the second at \$140. That the defendant is an illiterate man, and does not know how to read, and merely writes his name mechanically. That after the expiration of the second year, the parties had a full settlement, and the defendant paid the full amount due. At that settlement it was admitted that a note had been given for the first year's services, but it was stated to have been lost, and that the defendant paid, notwithstanding the note was not produced. The plaintiff admitted that a note had been given to him, but said: "Joseph, why were you such a fool as to sign a note without having it read to you?" The plaintiff afterwards admitted that the note had not been lost, but that he had it in his pocket all the time. This evidence appears to have left no doubt on the mind of the district judge, that the note now sued on is the same which the plaintiff pretended

Banks and another v. Doughty.

was lost, and which he read to the maker, at the time it was executed, as one for \$120 only; and it leaves none on ours. The evidence was admitted without objection; and the record discloses nothing which can induce us to comply with the request of the counsel for the appellant, to change the final judgment rendered below, into one of non-suit.

Judgment affirmed.

THOMAS BANKS and another v. WILLIAM DOUGHTY.

In an action by plaintiffs against defendant for a trespass on their lands, by cutting timber, etc., it was proved that defendant had purchased timber from persons who had settled on the land claimed by plaintiffs, and been left in quiet possession. There was no evidence that they were informed of plaintiffs' title, nor was there any knowledge of it brought home to defendant. The sale by which plaintiffs acquired their title, did not appear to have been recorded in the parish in which the land was situated: *Held*, that there must be judgment for the defendant.

APPEAL from the District Court of St. Mary, *Boyce, J.*

Splane, for the appellant.

T. H., and *W. B. Lewis*, for the defendant.

BULLARD, J. The plaintiffs, alleging that they are the owners of two tracts of land in the parish of St. Mary, complain that William Doughty has committed trespass on the same, by cutting trees of great value, particularly a large quantity of live oak, to their damage \$2,000, for which they sue.

The defendant answered by a general denial. There was judgment in his favor, and Banks, one of the plaintiffs, has appealed.

The evidence shows, that the defendant purchased live oak timber of certain persons who had settled upon the land claimed by the plaintiffs; but there is no evidence that they were informed of the plaintiffs' title. They had been left in quiet possession; and the sale by which the plaintiffs acquired their title does not appear ever to have been recorded in the parish in which the land is situated; nor is any knowledge of the plaintiffs' title brought home to the defendant, who contracted with those settlers to supply him with timber.

Judgment affirmed.

Bigler v. Brashear. Bateman v. Dazy.

WILLIAM BIGLER V. WALTER BRASHEAR.

APPEAL from the District Court of St. Mary, *Boyce, J.*

Splane and Stewart, for the appellant.

Dwight and Crow, for the defendant.

BULLARD, J. The plaintiff sues for the value of a patent corn mill, which he alleges the defendant clandestinely carried away and converted to his own use, and refuses to restore.

The defendant answers that he took a corn mill from a plantation which is his own property, and removed it to another plantation. That he purchased at sheriff's sale, in the case of *Lapice v. Bigler*, the present plaintiff, all the right, title and interest of said Bigler in the said plantation, with all the buildings and improvements thereon, and that the corn mill was then on the plantation, and formed a part of the property sold. He denies that it was removed clandestinely.

The evidence shows that the corn mill was set up and attached to a steam engine which propelled a saw mill, before the sheriff's sale, on the place belonging to Walker and Bigler, and which was purchased by the defendant.

This evidence fully authorised the judgment pronounced by the court below in favor of the defendant.

Judgment affirmed.

JOHN M. BATEMAN V. BARKER DAZY.

Where one sues for the possession of a house, built on his land for him by defendant, which the latter refuses to surrender, or for the value of the property, with damages for its detention, judgment should not be rendered condemning defendant absolutely to pay the value of the house, thereby rendering him the owner of the building. The judgment should be in favor of plaintiff for the possession of the house, with damages for its detention.

APPEAL from the District Court of St. Mary, *Boyce, J.*

MORPHY, J. The plaintiff sues to recover the possession of a dwelling house, built for him by the defendant, and which the

Littell v. Dolbear.

latter refuses to surrender, or the value of said property, which he lays at the sum of \$1,500, with damages for the unjust detention. The defendant pleads the general issue, and claims \$1,250, for five hundred cords of wood cut upon his land, and a large quantity of cypress timber removed therefrom by the plaintiff. There was a judgment below in favor of the latter for \$1,500, and the defendant appealed.

The evidence fully establishes the plaintiff's right to the property he claims the possession of, and its value as stated in the petition; but the judgment complained of is erroneous, in having decreed the defendant absolutely to pay to the plaintiff the sum of \$1,500, and thereby rendering him the owner of a house built on plaintiff's land.

It is therefore ordered that the judgment of the District Court be reversed, and that the plaintiff recover the possession of the house mentioned in the petition, reserving his right to claim such damages as he may have sustained in consequence of its illegal detention, and that the plaintiff and appellee pay the costs of this appeal.

Gibbon, for the plaintiff.

Splane and *Stewart*, for the appellant.

ELIAKIM LITTELL V. RUFUS DOLBEAR.

Where the record of appeal was not filed for more than twelve months after the return day, no application having been made for further time, and it is not pretended that the appellant was prevented from filing it sooner by any event not under his control, the appeal will be dismissed.

APPEAL from the District Court of St. Landry, *King*, J.

MORPHY, J. A motion to dismiss this appeal has been made, which, we think, must prevail. The order of the judge below made it returnable on the first day of the session of this court to be holden in the town of Opelousas, on the fourth Monday of August, 1844. The transcript was filed more than one year after the return day. No application was made for further time; nor is it pretended that the appellant has been prevented

Gautret and another, Heirs. v. Constant.

from filing the record within the legal delay, by any event not under his control. He stands, therefore, before us without any excuse; and his appeal must be, and is hereby dismissed, with costs.

T. H., and *W. B. Lewis*, for the appellant.

Overton and *Dupré*, for the defendant.

AZELIE DELPHINE GAUTRET and another, Heirs of Suzanne Theriot, deceased, v. JEAN C. CONSTANT.

No appeal will lie from a judgment refusing a continuance; if improperly refused, the error may be corrected by appeal from the final judgment. C. P. 566.

APPEAL from the Court of Probates of St. Martin, *Briant, J. Voorhies*, for the plaintiffs.

Derbes and *Magill*, for the defendant.

SIMON, J. On the day fixed for the trial of this case in the lower court, the defendant attempted to obtain a continuance thereof, on producing an affidavit in which he showed that some of his witnesses were absent, &c. This was refused by the judge *a quo*; whereupon the defendant immediately took an appeal from the order of the court overruling his motion; and said appeal having been granted, no further proceeding was had in the case.

The suit was continued by the effect of the appeal, which was improperly allowed, and we cannot see any object in the appellant's calling upon us to reverse the interlocutory order of the court *a qua*. He has attained his object, and has even obtained by the appeal longer time to prepare his case than he otherwise would have had, if the continuance applied for had been granted. Code of Practice, art. 1035.

This case is not an appealable one. The order complained of is a mere interlocutory one, which does not work any irreparable injury; as, if erroneous, it may be corrected by appeal from the final judgment. Code of Practice, art. 566. 7 Mart. N. S. 133.

Appeal dismissed.

Dwight and another v. Splane.

AMOS T. DWIGHT and another v. ALEXANDER R. SPLANE.

Commissioners to take depositions in other States or Territories of the Union, appointed by the Governor under the act of 10 March, 1838, are state officers, and the courts are bound to recognise their official signatures and seals.

One to whom a commission to take testimony is directed is not required to reduce the testimony to writing himself. It is sufficient, when not taken down by the witness, that it be written by any disinterested person.

The fact that the blanks in a printed commission to take testimony were filled up by an attorney of one of the parties, is immaterial, where the commission was signed by the clerk of the court from which it was issued, and sealed with his official seal. A commission to take testimony within the State, may be directed, generally, to any judge, or justice of the peace, in a particular parish.

The associate judges of the City Court of New Orleans, as well as justices of the peace, being officers of the State, their signatures and official seals prove themselves. Where a witness examined under a commission neglects to answer a cross interrogatory, but in answering the last direct interrogatory states facts not called for by it, but which are a complete answer to the cross interrogatory, the statement will be presumed to have been intended as an answer to the latter, and the evidence will be admitted.

APPEAL from the District Court of St. Mary, King, J.

W. C. Dwight, for the plaintiffs.

Splane, appellant, *pro se*. *Stewart*, on the same side.

GARLAND, J. The defendant is sued on a promissory note drawn by Samuel Crans & Co., to the order of the plaintiffs, they alleging that defendant was a partner in said firm, which was a commercial one. The defendant, after a general denial, specially denies that the note sued on was ever signed by any one of the members of the firm of Samuel Crans & Co. He further avers that, if said firm ever purchased any goods of the plaintiffs, they have paid for them.

On the trial of the cause, the plaintiffs introduced the most conclusive testimony, that the firm of Samuel Crans & Co., in March, 1839, purchased a quantity of merchandise of the plaintiffs, for which the note sued on was given, and signed by D. J. Green, one of the members of the firm. Subsequently to the maturity of the note, it was presented for payment at the place of business of Crans & Co., at Port Hudson; the genuineness of the signature was not then denied; but, on the contrary, admitted, and a payment made, which is endorsed on the note.

Dwight and another v. Splane.

The clerk of Crans & Co. testifies that the goods were purchased of plaintiffs, and that they were credited with the amount on the books of said firm. On one occasion when the note was presented for payment, the witness was sent out to endeavor to make collections to pay it. Other means were also used to raise money to pay it, which were ineffectual.

One witness for the defendant says, that he is acquainted with the signature and hand-writing of Green, and should not take the signature to the note to be his, although it resembles his signature. He has often seen Green write the name of the firm of Crans & Co., and this signature is not in the way in which he usually signed the name of the firm. Another witness says, that he has frequently seen Green write. Has never seen him sign the name of the firm. This signature is not in the general hand writing of the firm, but it is not unusual to write the partnership's name in a peculiar style. If the note had been presented to witness without previous notice, he would have supposed it to have been written by Samuel Crans.

The testimony for the defendant is of a negative character and by no means positive, whilst on the part of the plaintiffs it is direct and weighty. - There was a judgment for the plaintiffs, and the defendant has appealed.

Our attention has been called to two bills of exception, taken by the defendant to the reception in evidence of certain depositions offered by the plaintiffs. They offered, first, the deposition of George A. Trowbridge, taken in New York, before Benjamin D. Silliman, Commissioner in New York for the State of Louisiana. The defendant's objections are, that the deposition had not been taken and reduced to writing by any person named in the commission, nor by any person duly authorised to take depositions, and that the capacity of the person who took the deposition was not proved. The commission is directed to three judges by name in the city of New York, "or to any Commissioner in said State, to take depositions for the State of Louisiana." The commission was executed, and the deposition taken before Benjamin D. Silliman, as above stated; it is signed by him, and his seal is appended to his certificate. He certifies that the "examination was taken, reduced to writing, and by

Dwight and another v. Spauld.

the witness subscribed and sworn to" before him. This, in our opinion, is sufficient. The Governor of the State is, by law, authorised to appoint one or more persons, of known integrity and learning, as commissioners for each State and Territory in the Union, who shall reside therein, and have authority to take depositions in virtue of any commissions that may be directed to them by the courts of this State. They must conform to the laws of the State in the execution of those commissions, and the statute gives them a legal effect. B. and C's. Digest, 164. The commissioner appointed by the Governor is a state officer, and the courts are bound to recognise his official signature and seal.

In this case the law has been complied with. In the 7 La., 585, it was decided that the law does not require the commissioner to reduce the testimony to writing. It is sufficient, when not written by the witness, that it be written by an indifferent or disinterested person. The witness in this instance wrote his own answers. The court did not err in admitting the deposition.

The defendant also objected to some other depositions, on the ground: 1st. That the commission was filled up in the hand writing of the plaintiffs' attorney. 2d. That it was not directed to any particular judge or justice, and the testimony was taken by a person whose capacity is not shown. 3d. That one of the witnesses examined, did not answer the cross interrogatory of the defendant. 4th. That there was no seal to the commission. As to the first objection, we are not aware of any law that forbids the attorney of a plaintiff or defendant to fill up the blanks in the printed form of a commission; nor has the defendant referred us to any. It is admitted that the clerk signed the commission, and it appears to have the seal of his office attached to it, although this is denied by the defendant in his fourth objection. There is no force in the second objection. The commissions are directed to any judge or justice of the peace in New Orleans, or the parish of East Baton Rouge. One deposition was taken before M. Moreno, a justice of the peace in the latter parish, and the others before O. P. Jackson, one of the judges of the City Court in New Orleans. Mr.

Dwight and another v. Splane.

Moreno and Judge Jackson are state officers, and their official capacity and authority is proved by their official signatures and seals of office. It is not necessary, within the State, to direct a commission to a particular individual; it may be directed generally to any judge or justice in a particular parish, and it may then be executed by any such officer, and the official certificate is sufficient evidence, until the contrary be proved. The third objection is not stronger than the others. The defendant's cross interrogatory is, are you in any manner interested in the result of this suit, and do you know any thing that is important to the defendant, if so, state it? One of the witnesses, in answering the last interrogatory of the plaintiffs, proceeds to say, without its being stated as an answer to the cross interrogatory, that he is not interested in the suit, and that he knows nothing that would be important to the defendant. The interrogatory of the plaintiffs called for no such answer as this, and we have no doubt that it was intended as a response to the defendant's cross interrogatory, although not so stated. The commission has a seal to it, which disposes of the fourth objection.

On the merits, the case is most clearly made out in favor of the plaintiffs.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with five per cent damages on the debt and interest, with the costs of this appeal.

SAME CASE—ON AN APPLICATION FOR A RE-HEARING.

In this case, upon an application for a re-hearing, the court have determined to amend its former judgment, by remitting the damages for a frivolous appeal; and the clerk in making out a copy of the judgment to be filed in the court below, will omit the part in relation to damages.

WILLIAM OFFUTT and Wife v. CONSTANCE COLLINS and others.

A memorandum at the bottom of an account rendered by plaintiff's tutor, in 1828, stated, that there was a note belonging to the estate of the minor, deposited in the office of the parish judge, which, when collected, would be accounted for. A further account was rendered in July, 1834, not including any part of the proceeds of the note, nor alluding to it, and the minor, who was emancipated by marriage, assisted by her husband, a few days after gave the tutor a receipt for the full amount coming to her, and a complete discharge. In February, 1844, plaintiff sued the heirs of the tutor, to recover her share of the proceeds of the note: *Held*, that the action was prescribed by art. 356 of the Civil Code.

APPEAL from the Court of Probates of St. Landry, *Garrigues, J. Martin*, for the appellants.

T. H., and *W. B. Lewis*, for the defendants.

MORPHY, J. On the 10th of January, 1828, Moses Littell, acting as the tutor of Eliza M. Posey, one of the petitioners, and of two of her brothers, rendered to his said wards an account of the estate of their deceased mother, the widow of Lloyd Posey, showing the balance then due to them. To this account was attached a note or memorandum in the following words and figures, to wit: "There is a note due the estate by Theophilus Collins, dated 10th of March, 1823, for sixteen hundred dollars principal, and bearing interest at ten per cent, which note when collected will be accounted for; said note being deposited with this proceeding in the office of the parish judge." On the 12th of July, 1834, Moses Littell rendered to his wards another account, in which, referring to the settlement of their mother's estate, he accounts to them for some money received from the estate of their grand mother. On the 21st of the same month Eliza M. Posey, assisted by Wm. Offutt, to whom she had been married a few months before, executed to her said tutor a receipt in which she acknowledges to have received from him \$1,790 13½, being the full and entire amount of her share in the succession of her mother, and gives him a full and complete discharge. She now brings the present suit, and claims of the widow and heirs of Moses Littell her proportion of the note of \$1,600, alleging that he died without having ever accounted to her for the same. The defendants denied their indebtedness, alleging that Moses Littell

Offutt and Wife v. Collins and others.

had accounted for and paid to the petitioner all that he ever owed her, that he never received any part of the note sued for from Theophilus Collins, who was never, at any time from the beginning of 1823, up to the time of his death, able to pay the same, having been, during said period, utterly and entirely insolvent. They further pleaded the prescription of four years. There was a judgment below in favor of the defendants, and the plaintiffs appealed.

Being of opinion that the plea of prescription, upon which the defendants rely, must prevail, we have found it unnecessary to examine any other question in the case. The record shows that the petitioner Eliza M. Posey, became of age in September, 1836, and that this action was instituted only on the 19th of February, 1844, thus bringing this case within the provision of article 356, which provides that "the action of the minor against his tutor, respecting the acts of the tutorship, is prescribed by four years, to begin from the day of his majority." But it is urged that, as in the first account rendered, the tutor acknowledges that the note of Collins, when collected, should be accounted for, the receipt executed in 1834, must be considered as given under this condition, and that the debt then became an ordinary transaction between the parties, to which the prescription invoked cannot apply. In this position we cannot acquiesce. Admitting that the tutor's liability to account for this note continued after the full discharge and acquittance given to him in 1834, when the note itself had become prescribed, yet the nature of his liability remained the same. It had grown out of the tutorship. His neglect to collect this debt of his ward, which continued up to the time of her majority, was, in the language of the law, one of the acts of the tutorship respecting which she should have brought her action within four years after she became of age. In a case decided at our last session in the Eastern District, we had occasion to apply this kind of prescription. The authorities then examined, which are not at present within our reach, fully satisfy us of its entire applicability to this case.*

Judgment affirmed.

*The case referred to is that of *Gourdain v. Davenport*, 10 Robinson, 173.

Lafleur v. Hardy and others. Gilly v. Hardy.

MARCELIN LAFLEUR v. CONSTANTIN HARDY and others.

HYPPOLITE GILLY v. CONSTANTIN HARDY.

To annul a sale on the ground of fraud, the creditor must prove the inability of the debtor to pay his debts, and injury to himself. *Per Curiam*: A contract, though made in bad faith, cannot be rescinded by creditors unless it operate to their injury. C. C. 1973.

The seizure under a *fi. fa.* of the interest of a debtor in notes, entitles the seizing creditor to be paid by preference out of the proceeds.

APPEAL from the District Court of St. Landry. The judgment in the first case was rendered by *Boyce, J.*; in the last by *King, J.*

BULLARD, J. The facts disclosed in these two cases, which have been argued together, are that, in 1842, Girard and his wife sold to Hardy certain property, partly moveable and partly immovable, for about nine thousand dollars, on a long credit, and notes were given for the price, secured by mortgage on the real estate sold. Girard transferred these notes to Gilly of New Orleans, who was his creditor for about eleven hundred dollars. At the time of this sale, it appears there was no mortgage on the property, either judicial or conventional. In June, 1843, Durand and Uzureau obtained a judgment against Girard, for \$568 25, of which \$280 is unpaid. When they ascertained that Girard had transferred all the notes for which he had sold his property to Gilly, they applied to the latter, and were informed by him that his claim was only \$1,104 75, and that the notes had been transferred merely to secure that sum, and that, as soon as that amount was paid, the balance of the notes would belong to Girard. Thereupon they caused the interest of Girard in the notes to be seized. Afterwards, in December, 1843, Lafleur, another creditor of Girard, brought a revocatory action against Hardy and Girard, to set aside the sale, as fraudulent. He obtained a judgment for \$798, declaring the sale fraudulent as to him, and subjecting the property to be seized and sold to satisfy his demand. From this last judgment Girard, and Gilly, who was not a party, but who complains that he is aggrieved by the judgment, have appealed.

In the meantime, Gilly took out an order of seizure and sale upon the notes and mortgage, having obtained a notarial act of

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subrogation from Girard and wife. The real estate was sold, and produced \$1,870, thus leaving a surplus, after paying the debt due to Gilly, to be distributed between Durand and Uzureau and Lafleur, the sole remaining creditors of Girard. The order in which these last are entitled to participate in this fund, forms the subject of the second appeal from a judgment of the District Court giving a preference to Durand and Uzureau over Lafleur.

The evidence in the revocatory action is, in our opinion, insufficient to establish the fraudulent character of that transaction, so far as it concerns the plaintiff as a creditor of Girard. The inability of Girard to pay his debts is not proved, and no injury to the plaintiff is shown; and it is clear and well settled that, although a contract may be made in bad faith, it cannot be rescinded by creditors unless it operates to their injury. Civil Code, art. 1973.

But neither Gilly, nor Durand and Uzureau were parties to that action. They had acquired rights in good faith; the one by a transfer of Hardy's notes, and the other by a seizure of the residuary interest of Girard, which cannot be affected by the proceedings of Lafleur, which, as to them, were *res inter alios actæ*. The right of Gilly to be first paid is incontestible. Durand and Uzureau were very properly preferred to Lafleur, because they had a judgment and seizure of the interest of Girard after satisfying the demand of Gilly.

It is therefore ordered and decreed that the judgment in the case of *Gilly v. Hardy*, (no. 4321), be affirmed with costs; and that the judgment in the case of *Lafleur v. Hardy* and others, (no. 4216), be reversed so far as it annuls the sale from Girard to Hardy as fraudulent, and be affirmed in all other respects; and that the appellees pay the costs of this appeal.

Linton, for Lafleur.

Lataste and *Martin*, for Gilly and Girard.

Dupré, Administrator, v. Richard.

LASTIE DUPRE, Administrator of the Succession of Philippe Jean Louis Fontenot v. EUGENE RICHARD.

Where the protest of a notary is offered in evidence to prove a demand of payment of the makers of a note, it must appear from the protest itself that the notary had the note in his possession, and demand payment at the proper place and from the proper party. The answer of the party of whom the demand was made, must also appear in the protest.

Where, in an action against an accommodation endorser, the plaintiff has had a fair opportunity for making out his case, and has failed, the court will not render a judgment as in case of non-suit, on the mere suggestion that the notary, who was not examined as a witness, might, on another trial, testify to facts that would entitle the plaintiff to recover.

APPEAL from the District Court of St. Landry, *Boyce, J.*

GARLAND, J. This is an action against the defendant as the endorser of a promissory note for \$1000, with interest, drawn by Desessarts, Martel & Co., and payable at the domicile of P. J. L. Fontenot, now deceased, twelve months after date. It is alleged that, at the maturity of the note, it was regularly presented for payment at the place mentioned on its face, and protested for non-payment, and due notice given to the endorser. The answer is a general denial of all the allegations in the petition.

The evidence shows, that the note fell due on the 17-20 October, 1841. On the last named day the notary, in his protest, says, he "was, the day and month aforesaid, at the domicile of Philippe Jean Louis Fontenot, in the parish of St. Landry, and the subscribers of the said note did not come to pay the same;" wherefore he protested it, &c. The notary certifies that he gave notice of the protest to "the first endorser," (who is the defendant,) "by two letters, by me written; the first directed to Mr. Eugene Richard, Opelousas; the second letter directed to Mr. Eugene Richard, Plaquemine, parish of St. Landry. The first letter directed to Mr. Eugene Richard, Opelousas, was placed by me in the letter box at the post office in Opelousas town; and the second, directed to Mr. Eugene Richard, Plaquemine, St. Landry, was sent by an express conveyance—all done this 20th day of October, 1841." A witness for the

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plaintiff says, that the notary, in October, 1841, gave him a letter for the defendant. On the 27th of that month he delivered the same letter to Duclise Richard, to be delivered to defendant, who subsequently admitted to the witness that he had received the letter, and that it was a notice of protest. The holder of the note lived about forty miles from the defendant, in the same parish. Duclise Richard testifies, that he got a letter for defendant from the first witness, and delivered it the same day. He never got but one letter from the first witness for defendant. He does not remember the date. The post master at Opelousas says, that the notice, directed to defendant at that place, was stamped by him on the 21st October, 1841. He has given defendant letters and papers from his office at different times. Had no orders to forward his letters. Cook says, that he was the post master at Plaquemine Bruslée. That post office is about three miles from the residence of defendant, and the office at Opelousas is about seventeen miles from his residence.

There was a judgment for the plaintiff, and the defendant has appealed.

We are of opinion that the judgment is erroneous, and must be reversed. It does not appear from the statement of the notary, that he ever presented the note for payment to any one, or demanded payment. In fact, it no where appears, that he had the note in his possession. This is clearly insufficient. The law requires, that it shall sufficiently appear, from the act of protest, that the notary had the note in his possession, and that he demanded payment of it from some one. No special form is prescribed, but the facts must be substantially set forth, with the answer of the person of whom the demand is made. 12 La. 472. 16 *Ibid*, 308, 461. The counsel for the plaintiff has urged that, the notary could not make a demand, as Fontenot, at whose domicile the note was payable, was dead, and no one was there to whom the note could be presented. The statement of the notary is adverse to this argument, for his protest proves that Fontenot was alive.

The counsel for the plaintiff has asked us, in case the judgment should be erroneous, to do no more than give a judgment of non-suit. The demand is against the defendant, as an accom-

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modation endorser. The plaintiff has had a fair opportunity to make out his case, and has failed. We do not feel authorised, on a mere supposition that the notary might testify to something to help out his protest, to subject the defendant to the expense and trouble of defending another suit.

It is ordered and decreed, that the judgment of the District Court be annulled and reversed; and our judgment is in favor of the defendant, with costs in both courts.

T. H., and W. B. Lewis, for the plaintiff.

Linton, for the appellant.

CYPRIEN DUPRE V. EUGENE RICHARD.

After the dissolution of a partnership no one of the partners can bind the others by the use of the social name, nor by any acknowledgement of a debt or account.

Action against the endorser of a note, signed, after the dissolution of the firm, by one of the partners, without authority from the others, in the social name. It was proved that the note was executed at the request of the endorser; that he knew that the partnership was dissolved at the time; and that the note was given for the purpose of renewing one previously endorsed by him for the benefit of the partnership: *Held*, that the fact that the partner who made the note had no authority to bind the partnership, does not discharge the endorser, the partner who signed the social name having, at least, bound himself; that every endorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill, in favor of the holder, on the acceptor or obligor; and that a *bona fide* holder or endorsee may exercise his recourse against his endorser, without regard to previous parties to the note or bill, unless privity is shown between the endorsee and drawer, as to some fraud or illegality which the endorser may set up as a defence.

APPEAL from the District Court of St. Landry, *Boyce, J.*

Overton and Dupré, for the plaintiff.

Linton, for the appellant. Where a note is so drawn as not to bind the makers, it will be liable to the same objection on the part of the endorser. 3 Mart. N. S. 637.

SIMON, J. This suit is brought against the endorser of a promissory note, duly protested at maturity, drawn and executed in the name of Desessarts, Martel & Co. His defence is, that the drawer of said note, or the person who signed it in the name of the firm, was not authorised to do so. That the note

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was subscribed by Alexander Desessarts, who had, at the time, no authority to bind his co-partners, the partnership of Desessarts, Martel & Co., being, at that time, dissolved, and Balthazar Martel, one of the firm, the only person who had a right to terminate the business of the partnership.

Judgment was rendered below in favor of the plaintiff, and the defendant appealed.

It is not pretended that the defendant was not duly notified of the dishonor of the note, and the only question which this case presents is, whether the defendant, in a legal point of view, as well as under the circumstances of the case, can be allowed to set up as his defence that the note, which he endorsed, was drawn by one of the partners of a firm which was, at that time, dissolved, and who, having no authority to sign it, could not bind his co-partners under the social name?

The evidence shows that the note sued on, which was drawn for the sum of \$1270 10, on the 11th of September, 1843, was given in renewal of another note due by the firm, and held by the plaintiff, and which was also endorsed by the defendant. The old note was for the sum of \$1154 64, dated 11th of September, 1842, and made payable twelve months after its date. It fell due on the very day the new note was given, and one year's interest, at ten per cent, being added to the principal, the aggregate made exactly the amount of the note sued on. The defendant was present when the new note was made; it was signed by Desessarts, at his, defendant's, request, as a renewal; and the old note was given up to said defendant, after the new one had been handed over to the plaintiff.

It is a well settled doctrine that, after the dissolution of a partnership, no one of the partners is at liberty to use the social name so as to bind the others, and that the latter are not bound by his acknowledgement of any debt or account. 6 La. 683. 5 Rob. 172. 6 Ibid. 70. But the exception which may be considered as personal to the partners whose names have been used, may be waived by them, and, for aught we know, the partners of the firm, in whose names the note sued on was signed, may perhaps acknowledge their responsibility, on being apprized of the fact that it was given in renewal of one of the

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partnership notes, or become ultimately bound to pay its amount, on proof that its consideration was a real debt of the firm, contracted during the existence of the partnership. Be this as it may, the partner who signed the note in the name of the firm, would be bound, personally, to pay its amount, if repudiated by the others, and the effect of such repudiation, if successful, would be, that the note should be considered as drawn by Desessarts alone, who, being personally liable for its payment, would, perhaps, have an action against his co-partners, for the reimbursement of the money by him so expended for the benefit of the partnership. This shows that the note sued on was drawn by a person able to contract, if not for others, at least for himself; and this circumstance, coupled with the facts, that the defendant knew the origin of the transaction, that he was aware of its being in renewal of a debt of the firm, and that the note sued on was executed at his request, necessarily gives to the transaction the same force and effect as if the defendant had intended to endorse, and had actually endorsed, a note drawn by Desessarts in his own name. When he requested that said note should be executed, he knew that the firm was dissolved; it was given to the endorsee in lieu of one already endorsed by the defendant, for the benefit of the firm; the old note was given up to the latter, and, it seems to us, that the plaintiff's claim, being a *bona fide* one, as between him and the endorser at least, cannot be resisted on account of any equity existing between the drawers and said endorser.

But is it true, that the note having been drawn by a person who had no authority to bind his co-obligors, this is sufficient to discharge the endorser. There is no better settled doctrine than, that every endorsement is essentially an original contract, equivalent to the drawing of a new bill in favor of the holder, on the acceptor or obligor; and, as this court said in the case of *Olivier v. Andry* (7 La. 496), whether the endorsement was for the accommodation of the maker, or in the regular course of business, is immaterial. Chitty on Bills, 266. Considered in this light, the recourse of the endorsee against the endorser is a direct one, to be exercised from the moment that the endorser is duly notified of the dishonor of the note; the latter stands then

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as an original debtor as to the *bona fide* holder or endorsee, who is always at liberty to exercise his remedy against him, without any regard to the previous parties to the note or bill, unless privity is shown between the endorsee and the drawer, in relation to any fraud or illegality which the endorser may set up as a defence against his being bound to pay the obligation. Here no privity has been shown between the plaintiff and the drawer, Desessarts; on the contrary, if any privity exists, it is between Desessarts and the defendant, *at whose request the note was drawn*, and it is our firm opinion that the plaintiff is entitled to recover.

Judgment affirmed.

WILLIAM BIGLER V. WALTER BRASHEAR and another.

Where a purchaser of land at a sheriff's sale does not, at the time, exercise his right of requiring the sheriff to put him in possession, but permits a third person to occupy a part of the premises, he cannot afterwards, by a petition, addressed to the judge of the court from which the execution was issued in chambers, obtain, in a summary way, an order directing the sheriff to put him in possession.

APPEAL from the District Court of St. Mary, *Boyce, J.*

BULLARD, J. Brashear, having purchased at sheriff's sale a tract of land belonging to the present plaintiff and R. J. Walker, did not require of the sheriff to put him in possession of the whole of the property purchased, but permitted the plaintiff to remain on a part of the land, stating, in writing, that in taking possession of a part of the claim of R. J. Walker, on the bayou Bœuf, purchased at sheriff's sale, it was not his object to interfere with any right which William Bigler may have as a settler on public lands, and admitting that he found him in his present occupancy on the 22d of February, 1842. This paper is dated on the 24th of that month.

On the 16th of April of the same year, Brashear applied by petition to the judge of the Fifth District,* in chambers, setting forth his purchase at sheriff's sale, in December, 1841, and that

*The execution under which Brashear purchased was issued from the District Court to the judge of which he applied for the order to put him in possession.

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Bigler had immediately returned to the house where he had previously lived, and which formed a part of the property sold, and had refused to deliver up or relinquish the same to him, and praying that the sheriff may be commanded by *mandamus* to eject the said Bigler from the premises, and deliver the same to him. Upon this petition the judge gave a written order to the sheriff, to give to the petitioner possession of the premises described in the petition, and to make return of his acts within forty days. The clerk thereupon issued a formal writ of possession, and it was to restrain the sheriff in the execution of that writ that the present injunction was obtained.

The injunction was dissolved after trial upon the merits, and the plaintiff has appealed.

It is not necessary to enquire, at this time, what effect ought to be given, as it relates to the plaintiff's right of possession, to the written admission of the defendant, Brashear; but we are clearly of opinion that, whatever may be the rights of the parties, the purchaser at the sheriff's sale has mistaken his remedy; and that the order to the sheriff to put him in possession was improvidently issued, and ought to be set aside. The purchaser had an undoubted right to require the sheriff to put him in possession at the time of the sale; but having desisted from this right, and even permitted the plaintiff, Bigler, to occupy a part of the premises, the judge in chambers, was unauthorised, in a summary way, to order the sheriff to proceed and eject him.

It is, therefore, adjudged and decreed that the judgment of the District Court be reversed; and it is further decreed that the injunction herein granted be maintained and perpetuated, and the writ of possession quashed and set aside, reserving to Walter Brashear any right he may have, by legal means, to obtain possession of the property purchased by him; and that he pay the costs of both courts.

Splane and Stewart, for the appellant.

Dwight, for the defendants.

Beasley and another v. Allen.

GABRIEL BEASLEY and another v. WILLIAM P. ALLEN.

Money paid through error, the debt having been previously satisfied, may be recovered back. C. C. 2129, 2280.

APPEAL from the District Court of St. Mary, *King*, J.
Dwight, for the plaintiffs.

Splane and *Stewart*, for the appellant.

MORPHY, J. The petitioners seek to recover back from the defendant the sum of \$440, which they allege that they have paid to him through error. They aver that, in the year 1838, being the contractors for the United States mail route, no. 4107, and being unprepared to commence carrying the mail under said contract on the 1st of January, 1838, the said Wm. P. Allen, the former contractor on said route, was authorised by Guy H. Bell, Esq., post master at Opelousas, to continue to carry the mail on said route until they could begin under their contract; that the said Allen carried the mail from the 1st of January, 1838, to the 3d of February following, for which he was entitled to receive, and did receive from the United States government, through the hands of said Bell, the said sum of \$440; that the said Allen, pretending not to have been paid, did then demand and receive from the petitioners, a like sum of \$440, for which he gave them his receipt, assuring them that if they paid him for said services they would of course receive from the United States government the whole amount of money due on their contract from the 1st January, 1838. That they were led into error by the said Allen, and paid him under the belief that he had not been paid for his services, &c. The defendant pleaded the general issue, and denied having signed the receipt mentioned by the petitioners, averring that, if he signed it at the time, it was to enable them as mail contractors, to draw the money from the government; that the plaintiffs have so drawn the money from the government, have used it, and have never paid it over to the defendant, who, for his services in transporting the mail, has been paid neither by the plaintiffs, nor by Guy H. Bell. The plaintiffs had a judgment below, from which the defendant appealed.

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On the trial of the case, the signature of the defendant to the receipt mentioned in the plaintiffs' petition, was admitted. This tardy admission should perhaps not prevent the application of the penalty, which the law inflicts on suitors who plead falsely as to the execution of the instrument on which they are sued; but be that as it may, the facts set forth in the petition are fully made out. From the whole evidence taken together, we are satisfied that Guy H. Bell, the post master at Opelousas, paid to the defendant for carrying the mail from the 1st of January, 1838, to the 3d of February following, a sum of \$440, for which he had credit from the government, and that this amount was retained by the post office department in the settlement made with the plaintiffs under their contract, on the ground that it had been paid to the defendant by Guy H. Bell, who had a right to engage his services until they came forward to execute their contract. This sum having been clearly paid by the plaintiffs through error, they have a right to recover it back. Civil Code, arts. 2129, 2280. 4 Robinson, 137.

Judgment affirmed.

BENJAMIN F. MAYES, Natural Tutor of William S. V. Mayes and others, Minors v. JOHN SMITH and another.

A minor cannot sue in his own name, but only in the name of his tutor, duly qualified to act as such. *Per Curiam*: A judgment would not be *res judicata* as to the minor, unless it appeared that the person assuming to represent him was duly qualified. Nor would the defect be cured by suing in his name, assisted by his father.

A natural tutor must take an oath before he can act as such. C. C. 328.

Where a defendant in an action commenced by injunction, excepts to answering to the merits, on the ground that the oath taken and the bond given to obtain the injunction, were taken and executed by one claiming to act as the attorney in fact of the plaintiff, though no copy of the power was annexed to the petition, the power must be produced, or the action will be dismissed. C. C. 320.

APPEAL from the District Court of St. Mary, Boyce, J.

BULLARD, J. The defendant Smith, having a judgment against Benjamin M. Mayes, caused a writ of *feri facias* to issue, and the sheriff levied upon a number of slaves and some horned cat-

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tle, as his property. Among other slaves seized, was Harriet and her three children. Mayes made his escape to Texas with all the other slaves, and, after his departure, and before the day of sale, A. R. Splane, Esq., as his agent and attorney in fact, presented a petition in the name of Mayes, styling himself the natural tutor of his minor children, in which he claims the said Harriet and her children, and a few head of cattle, as the property of his minor children, in the right of their deceased mother, to whom he alleges the slave Harriet had been bequeathed by her father, Gabriel Smith, late of Wilkinson county, in the State of Mississippi. He prayed for an injunction to stay proceedings on the execution, which was accordingly granted.

The defendant Smith, before answering to the merits, filed his exceptions: 1st. That the plaintiff is not the tutor of the minors he assumes to represent, and has no right to sue as such.

2d. That the persons declared in the petition to be minors are made parties, and assisted by said Mayes, the suit being thus brought by minors, which the law does not allow in such cases. And lastly, that the oath is taken and the bond signed A. R. Splane, claiming to be agent and attorney in fact, and no copy of said power is annexed to the petition.

These exceptions were overruled, an answer filed to the merits, and, after trial had, the injunction was perpetuated, and the slaves claimed decreed to be the property of the minors. The defendant Smith appealed.

We are of opinion that the exceptions were well taken, and ought to have been sustained, and the suit dismissed.

Minors can only sue by their tutor duly qualified to act as such. Even the natural tutor is required to take an oath before he can do any act as such. Civil Code, art. 328. A judgment pronounced against minors would not be *res judicata* as to them, without its appearing that the person, assuming to represent them in a judicial proceedings, had been duly qualified. This defect is not cured by suing in the name of the minors themselves, assisted by their father. They cannot sue in their own names; it is their tutor alone who can sue in his name, as tutor.

We are further of opinion that the attorney in fact who took the oath, and subscribed the bond, was bound to produce his au-

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thority when called on, as in this case. Code of Practice, art. 320.

This view of the case renders it useless to enquire into the validity of the donation.

It is therefore adjudged and decreed, that the judgment of the District Court be reversed; and it is further ordered, that the exceptions be sustained, the suit dismissed, and the injunction dissolved, and that the defendant Smith recover of the plaintiff, two per cent interest on the amount of the judgment, to wit, \$7,869 74½, together with one per cent damages, reserving to the defendant his right to recover of the surety on the injunction bond according to law; and that the plaintiff pay the costs in both courts.

Splane, for the plaintiff.

Dwight, for the appellant.

SAME CASE—APPLICATION FOR A RE-HEARING.

GARLAND, J. On the application of the counsel for a re-hearing, we have again examined this case. An examination of the writ of injunction satisfies us, that the sheriff and Smith were only enjoined from proceeding on the execution, in favor of the latter against Mayes, against the slaves Harriet and her children. And as nothing in the record shows what was the value of these slaves, there is no sum upon which the interest and damages asked, can be estimated; we have therefore concluded to amend our former judgment, by striking out that part which relates to interest and damages, leaving the defendant Smith to his remedy on the injunction bond; and the clerk in making out the copy of the opinion and judgment to be filed in the court below, will omit the part relative to interest and damages.

As to the other grounds filed for a re-hearing, we see no sufficient cause to induce us to change our former opinion.

Crow and another v. Yocom.

BASIL C. CROW and another v. MARTHA YOCOM.

A note executed by a married woman, without the authorisation of her husband or of the judge, for the fees of counsel, employed by her to institute a suit against her husband for a separation of property, is not binding on her. C. C. 123, 127, 129, 1775, 1779. The order of the judge, authorising her to sue, cannot be considered as empowering her to contract with any one with reference to the suit. But where a suit for separation has been actually brought, the attorneys employed by her may sue, on a *quantum meruit*, for the value of their services.

APPEAL from the District Court of Lafayette, King, J.

SIMON, J. The plaintiffs seek to recover the sum of \$500, which, they allege, is the amount of a note executed in their favor, by the defendant, for the consideration therein stated, to wit, for their professional services rendered to her in recovering her property. They state themselves to be partners in the practice of the law, under the style of Crow & Porter.

The defendant resists their claim, on the allegations that the note sued on was given for a consideration entirely different from that which is expressed on the face of the note; that the plaintiffs were to represent and defend the interests of her late husband in a suit then pending against him in the District Court of the parish of Lafayette, but that they failed to comply with the condition of said note; that, owing to their negligence and mismanagement, the suit was decided against her late husband, and he was condemned to pay a large sum of money, &c., in consequence of which she has sustained damages to the amount of \$1000, which she pleads in reconvention. She further sets up that, at the time of the execution of the note sued on, she was a married woman, and that the same was executed without the authority or consent of her husband.

The plaintiffs had judgment in the lower court for the amount sued for, and the defendant appealed.

The record establishes that the plaintiffs, who are attorneys and counsellors at law, practising their profession in partnership, were employed by the defendant to institute a suit, in her name, for a separation of property against her husband. Said suit was instituted on the 8th of July, 1842, after having ob-

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tained the judge's order to authorise the wife to institute it on the day before; and the note sued on is dated 4th of July, 1842. So far then, said, note would appear to have been made in contemplation of said suit, which was subsequently carried to final judgment in favor of the plaintiffs' client. But the note sued on was executed by the defendant without the consent or authorisation of her husband, or of the judge, and the first question which occurs is, can the plaintiffs recover on said note?

This action is not brought on a *quantum meruit*, but is based upon a special contract, alleged to have been entered into by the defendant for the purpose of procuring the plaintiffs' services, and evidenced by the note sued on. At the time it was made the defendant was a *feme covert*, and could not, in any manner, contract without the authorisation of her husband, or that of the judge. Civil Code, arts. 123, 127, 129, 1775, 1779. 10 La. 161. 12 Ibid. 13. 3 Rob. 329. It is true the order of the judge was subsequently obtained, by which she was authorised to prosecute her action, but such order, special in its effect, even if it had been given before the date of the note, cannot extend to authorising her to contract with any one in view of the suit which she intended to bring, nor for any other purpose; and if she wished to make any such contract, it was necessary that, as under the then existing circumstances she could not perhaps have obtained the consent of her husband, against whom the suit was to be brought, she should apply to the judge, who, after having been made acquainted with its object and propriety, would have been enabled to authorise her to execute the contract in contemplation. As the case stands, we cannot give any effect to the contract declared upon in the petition. It is illegal, and not binding upon the defendant.

This view of the case precludes the necessity of inquiring into the consideration of the note sued on, and into the matters pleaded by the defendant in avoidance of the plaintiffs' demand; but we think the right of the latter to their action on a *quantum meruit* against said defendant for the value of their services, as her attorneys, should be reserved.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that ours be for

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the defendant, with costs in both courts, reserving to the plaintiffs their right to institute their action against the defendant on a *quantum meruit*, if they think proper, for the recovery of the value of their professional services.

Crow and Porter, for the plaintiffs.

Hallam, for the appellant.

JEAN BAPTISTE RICHARD, Administrator of the Succession of David Ackison, deceased, v. STEPHEN DEUEL and another.

The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or of age, have but a residuary interest, which can be ascertained only by a full administration. C.C. 1042, 1051.

The nullity resulting from the adjudication of the property of minors at a price less than the appraisement, is a relative one, of which they alone can take advantage. *Per Curiam*: The formalities prescribed for the sale of property of minors are exclusively for their benefit.

APPEAL from the District Court of St. Landry, *Boyce, J.*
Swayze and Taylor, for the plaintiff.

T. H., and *W. B. Lewis*, for the appellants.

MORPHY, J. This action is brought upon a note for \$551 66 $\frac{2}{3}$, given by the defendants in payment for certain lots of ground in the town of Opelousas, purchased from the estate of David Ackison, junior, deceased, of which the plaintiff is administrator. The defence set up is, that the property for which this, and two other notes, were given, belonged, in whole or in part, to the minor children and heirs of the late David Ackison, junior, and was sold for a less price than the appraisement, whereby the defendants acquired no good or valid title. They further say, that a judgment was rendered against them on the first of these notes, in which it is erroneously stated that they consented to said judgment; that if they ever gave any such consent, it was given in error, both of fact and of law, as it was but a short time since that they became aware of the fact, that the appraisement of the property was for a higher sum than the price of

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the sale. They pray that the sale of the lots of ground may be declared null and void, that the judgment rendered against them may be annulled, and that the three notes by them given may be cancelled, and returned to them. There was a judgment below against the defendants, from which they have appealed.

The record shows, that the property was appraised at \$1,800, and was adjudicated for \$1,655; that the deceased left a widow and minor children, to whom the price of the property, or whatever may remain after the payment of the debts of the estate, will go; and that the estate, which was first administered upon by Hilaire Desessarts, is now under the administration of the plaintiff. The record does not show what are the debts of the succession.

The question which this case presents is, whether the provisions of the Civil Code, in relation to the sale of property belonging exclusively to minors, apply to, and must govern sales made by administrators of estates, whether solvent or insolvent. Article 337, which provides that the minor's property cannot be sold for less than the amount of its appraised value mentioned in the inventory, provides, at the same time, that if there be no offer to that amount, it shall be again offered for sale at public auction, until the price of its appraisal may be obtained, reserving to the judge, with the advice of the family meeting, the power of extending the terms of credit granted, and of giving such other facilities as may procure a prompt and advantageous sale of the property, and of ordering other appraisements in case he shall be satisfied that the sale cannot be effected at the rate of the appraisal already made. No sale of a minor's property can take place, unless, on the representation of the tutor, a family meeting decides that it is absolutely necessary, or highly advantageous to him. Arts. 334, and 335. All these provisions which are to be found in the chapter of the Code treating of the administration of the tutor, would seem to relate to the separate and exclusive property of minors, in which no persons but themselves have an interest; but when an estate, in which they may be interested, is administered upon, for the purpose of being liquidated, and the balance paid over to them as beneficiary heirs, the property sold can

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hardly be considered and placed on the same footing as property exclusively belonging to them. The powers, rights and duties of an administrator are assimilated by article 1042 to those of curators of vacant estates. Under article 1051, he must proceed to the sale of the property of the succession he administers, and to the settlement of its affairs, and must pay over to the beneficiary heirs the balance of the proceeds of the sale, if any remains in his hands after discharging the debts of the estate. In such sales, no law requires that the property shall produce its appraised value, nor that a re-appraisement be made in case the first estimation be not obtained. In estates accepted with benefit of inventory, and to which an administrator is appointed, the heirs, whether minors or of age, have at best but a residuary interest, which can be ascertained only by a full administration. We, therefore, think that provisions relating to the sale of minors' property, do not apply to sales of property belonging to such estates; they are administered as insolvent, although they may turn out not to be so. Such was the opinion intimated by this court in *Towles' Administratrix, v. Weeks and others*. 7 La. p. 311. But even were the property sold to the defendants considered as having belonged to the minor children of the deceased, the nullity resulting from the adjudication of it below the appraisement price is a relative one, of which they alone, when they become of age, can avail themselves. This provision of law, and the other formalities required for the sale of property belonging to minors, are for their benefit. They might find it to their interest hereafter, not to disturb the purchaser, but to receive their proportion of the price, and thus ratify the sale which was originally void. Pothier, Vente, no. 14. 7 Toullier, no. 564. 10 Martin, 281. 6 Ib. N. S. 355. See also the case of *Rousseau and others v. Tête*, 6 Rob. 471.

Judgment affirmed.

Muggah and another v. Rogers.

JAMES M. MUGGAH and another v. MATHEW ROGERS.

An order written by the maker on the back of a promissory note, while in the hands of an endorsee to whom it had been transferred after maturity, requesting a third person to pay the note on a day named, is a mere indication by the debtor of a person who is to pay in his place, and does not operate a novation of the debt. On the failure of the person indicated to pay, the maker will be responsible. C. C. 2188, 2190.

APPEAL from the District Court of St. Mary, *Boyce, J.*

Splane and Stewart, for the plaintiffs.

Maskell, for the appellant.

SIMON, J. The defendant, sued on a promissory note transferred and endorsed over to the plaintiffs after maturity, is appellant from a judgment which condemns him to pay the amount thereof. His defence is, that the plaintiffs received in payment of said note, his, defendant's, draft, on Thomas Maskell, for the payment thereof; and that by their neglect in not presenting the same for payment, he is entirely released from the payment thereof, and that said plaintiffs have only their remedy on the draft.

It appears that the appellant being indebted to one H. H. Wadsworth, to whose order the note sued on was made payable, the same was endorsed in blank by the payee; John Muggah became the holder thereof, and endorsed it over to the plaintiffs, on the 1st of January, 1844, about nine months after its maturity. On the 6th of April following, the drawer of the note wrote on its back an order on Thomas Maskell, *to pay the within note on the first of May next*, and signed said order. Now, the testimony of the witness Maskell informs us, that the note having been presented to him by John Muggah during the time he owned it, with the order on the back of it, and he, witness, having some claims against said John Muggah, he, the witness, offered to give him up those claims, and pay the balance. Muggah objected to the arrangement, except as to some of the claims the witness held, which he was willing to receive; but they did not complete the arrangement. John Muggah afterwards transferred the note to the plaintiffs, who refused to receive payment in this way.

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The order written on the back of the note sued on, cannot be viewed in the light of a commercial transaction; it is rather in the nature of a delegation which does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor; or it is perhaps more properly an *indication* made by the debtor of a person who is to pay in his place, and which does not operate any novation. Civil Code, arts. 2188, 2190. The conduct of the parties to this transaction shows that neither of them understood it differently; the note was left in the hands of the endorsee, who called upon Maskell for its payment; the latter pretended to take advantage of the opportunity, for collecting some claims which, he says, he held against John Muggah; this did not suit the plaintiffs, who were the holders of the note long before the order was written on its back, and it is not astonishing that, having refused to consent to the arrangement proposed by Maskell, and which was not a payment in money, they subsequently called upon the defendant to pay the amount of the note. The defendant is their debtor, and not having succeeded in collecting their debt from the person indicated, they have the clear right of coercing its payment from the drawer of the note. 16 La. 474.

Judgment affirmed.

SUCCESSION OF WILLIAM HUTCHINGS—Henry E. Dwight, Administrator of the Succession of James L. Johnson, deceased, Appellant.

Though a contract by which a party alleges that he sells, and actually delivers certain lands and slaves to his endorsers, to be held by them until indemnified for their endorsements, reserving a right to redeem the slaves on discharging the endorsers from any liability, be decided by the Supreme Court to be a mortgage and not a sale, it must be duly recorded to entitle the endorsers to the privilege of hypothecary creditors, as against other creditors having mortgages regularly registered.

APPEAL from the Court of Probates of St. Martin, Briant, J. Splane, for the appellant.
Voorhies, contra.

Succession of Hutchings.

BULLARD, J.* The administrator of the estate of William Hutchings deceased having filed a *tableau* of distribution and a classification of the debts due by it, opposition was made by the administrator of the estate of James L. Johnson, deceased, on the ground that the estate of his intestate had a mortgage on all the real estate of Hutchings, recognised by the Supreme Court, and that the administrator had failed to place on his *tableau* the said estate, as a mortgage creditor for the balance due, to wit, \$765 49, with nine per cent from the 1st of April, 1837.

The sum thus claimed is the balance ultimately found due to Johnson's estate, by a judgment of this court, rendered at the September term, 1841, (19 La. 437,) upon a contract, much discussed in this court, in the cases of *Hutchings v. Field et al.* and the *Same v. Johnson*, 10 La. pp. 245, 257. That contract, it will be perceived by referring to it as recited in the report of those cases, was intended to secure to Johnson and others the reimbursement of certain sums which they had engaged to pay for Hutchings, to the Bank of Louisiana. Johnson treated it as a contract of sale of certain real estate and slaves. But this court held, that it had not all the essentials of a sale, but was rather in the nature of a mortgage, accompanied by delivery. Johnson was, therefore, held to account for the services of the slaves during several years while in his possession, in compensation of the amount paid by him in bank, and the result was the balance above mentioned. It is now contended, that his estate is entitled to be set down as an hypothecary creditor, in virtue of that contract, for the balance thus found due. To this it is answered that, whatever have been the character and effect of the contract between the parties, it never was recorded in the proper office, so as to give it effect as such against third persons; and that if it had been, it is prescribed by the lapse of more than ten years without reinscription.

It is clear that a mortgagee, whose title has not been duly recorded, is not entitled to be classed as an hypothecary creditor as it relates to other creditors having mortgages duly recorded.

* Simon J. being interested in this case, did not sit on the trial.

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In the case now before us, it is not shown that the contract, which we construed to be a mortgage and not a sale, was ever recorded in either of the parishes where the property was situated and Hutchings had his domicile.

The court, therefore, did not err in overruling the opposition.
Judgment affirmed.

MALACHI DUBOSE and another v. DANIEL O'BRYAN.

Where factors accept and pay a draft drawn on them, and charge it to the drawer in their account current, with a commission for making the advance, they cannot separate the draft from the account, and sue on it alone.

APPEAL from the District Court of Lafayette, *King, J.*

GARLAND, J. The petitioners, alleging themselves to have been commercial partners under the name of Dubose & Davis, sue for the use and benefit of George Lewis Davis, one of the partners, and aver that the defendant is indebted to them, for the use aforesaid, in the sum of \$499 35, with interest, said sum being the balance of a draft drawn on the 1st November, 1841, by defendant, on the petitioners, to the order of Cyprien Mouton, for \$650, payable ninety days after date, which draft was accepted and paid by the petitioners.

The defendant admits the signature to the draft, and pleads in compensation and reconvention various demands against Davis, and also against Dubose, and avers that there is a balance in his favor of \$731 61, with interest, for which he asks for a judgment.

Upon the trial, the plaintiffs introduced no other evidence of their demand than the draft drawn by defendant on them, in favor of Mouton, for \$650. The defendant offered in evidence an account current, furnished him by plaintiffs on the 13th April, 1842, from which it appears that the defendant had been, for a considerable time previously to the drawing of the draft sued on, doing business with the plaintiffs as factors and commission merchants, drawing drafts on them, and they furnishing him with merchandize and other things, and he sending them produce to sell on commission, drafts on other persons, and money

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to meet his engagements. On the 10th November, 1841, a few days after the date of the draft sued on, plaintiffs charged defendant in his account with the amount of it, and, on the day it fell due, charged him commission at the rate of five per cent for advancing, and subsequently made other charges, for interest and cash paid. On the 2d of February, 1842, when the draft became due, the defendant was, if the account current be correct, indebted to the plaintiffs in a balance nearly equal to that now claimed. Subsequently to the maturity of the draft, the defendant remitted in money, and consigned to plaintiffs cotton to be sold for him, to an amount very nearly equal to the amount of it. The plaintiffs did not apply the funds so sent to the payment of the draft, but credited them generally on the account, adding interest to their demand, whereby a balance was struck equal to the sum now demanded, to recover which the draft is now withdrawn, and suit brought on it. Besides this account, the defendant offered in evidence a note of Dubose, which had been transferred to him for \$645 63, and a draft for \$300, drawn by the same person on him, and paid.

There was a judgment in favor of the plaintiffs, and the defendant appealed.

We are of opinion that the judgment is erroneous. The judge gives no other reason for his judgment than, "that the law and evidence are in favor of the plaintiffs;" we are, therefore, not aware of the particular reasons that brought him to the conclusion he arrived at. We are of opinion that the plaintiffs cannot recover in the present action, because, by accepting and paying the defendant's draft, and charging it in their account current, they extinguished that obligation, and made it nothing more than a voucher to sustain that item in their account. They have no more right to withdraw or separate this draft from their account current, and bring suit on it, than they have to select any one of the other drafts drawn by the defendant and accepted, and paid by them, and to sue on it. If such a course were permitted, it would place the principal, or customer of a factor in the power of the latter, and often place the consignor, or drawer of a draft, in a position where he could not have the benefit of his real credits.

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There is no evidence in the record to show when the firm of Dubose & Davis was dissolved. The letter of Dubose, and the account current, go to show that it was in existence as late as the 13th April, 1842, yet the partners for sometime previously appear to have been managing their business in such a manner as to raise a suspicion that their purpose was to deprive the defendant of the right of compensating the demands he might have against them.

It is ordered and decreed, that the judgment of the District Court be annulled and reversed, and our judgment is in favor of the defendant, as in case of non-suit, with costs in both courts.

Magill, for the plaintiffs.

Crow and Porter, for the appellant.

 SIMEON SMITH v. JOHN G. RICHARDSON.

Where, in answer to an interrogatory, a party states facts not necessarily connected with that as to which he was interrogated, such irrelevant matter will be struck out, on motion.

Defendant promised, in writing, to pay to plaintiff, on a day fixed, a certain sum, in molasses at the market price. It was proved that, a few weeks before the time of payment, defendant wrote to plaintiff, requesting him to send, as soon as possible, casks in which to receive the molasses, as defendant apprehended that the cistern which contained his molasses would burst. Plaintiff did not send for the molasses, and, a few days after the debt was payable, defendant's cistern burst, and the molasses was lost. In an action against defendant for the amount so promised: *Held*, that admitting plaintiff was bound to furnish the casks, a mere notice to send them, without specifying any time at which the delivery was proposed to be made, is not a sufficient tender to place the molasses at his risk. Judgment for plaintiff for the amount claimed, payable in molasses, at the market price, at the time of payment.

APPEAL from the District Court of St. Mary, *Boyce*, J.

MORPHY, J. This action is instituted on a written obligation, in the words and figures following, to wit:

\$437 37.

Franklin, May 18th, 1839.

On, or before the first day of January next (1840), I promise to pay to Simeon Smith, or order, in good merchantable mo-

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lasses, at the market price, the sum of four hundred and thirty-seven 37-100 dollars, with interest at ten per cent per annum from this date until paid, for value received.

J. G. RICHARDSON.

The defendant answers that, although he did execute the note sued on, he is in no way liable for the same; that, as it appears upon the face of the instrument, it was to be paid in molasses, on or before the first of January, 1840, which he was ready and anxious to deliver, both before, and at the time agreed upon; that previously thereto he addressed to the plaintiff several letters, in which he informed him that his molasses cistern was weak, and that unless he should comply strictly with his part of the contract, by sending for the molasses, serious injury might happen to him (the defendant) by the bursting of his cistern, which, in fact, did take place after the first of January, 1840, by which he sustained a heavy loss, amounting to one thousand dollars, which would have been avoided by the plaintiff's complying with his contract. The defendant concludes by praying to be dismissed, with costs, and to have a judgment in reconvention against the plaintiff, for the sum of \$1000. There was below a judgment of non-suit, from which the plaintiff appealed.

On interrogatories being propounded to the plaintiff, to ascertain whether he did not receive, previously to the 1st of January, 1840, from defendant, or his son acting for him, letters, in one of which he was apprised of the weak condition of defendant's cistern, and requested to send, without delay, casks or barrels to receive the molasses, he answered by filing in court a letter in the following words, to wit:

Mr. SIMEON SMITH:

Dear Sir—My father has been expecting your casks for his molasses for a week; if he does not receive them soon his cistern will be in a bad situation. Please attend to it as soon as possible, and believe me, dear sir,

Yours,

F. D. RICHARDSON.

December, 19th, 1839.

The plaintiff stated, under oath, that this letter was the only one in his possession relative to the casks, adding, that he was

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firmly under the impression that, previously to the date of this letter, he received another one from F. D. Richardson, requesting him to send casks, as he apprehended that his father's cistern would run over; but he positively denied ever being requested to receive defendant's molasses, or ever being notified in any manner or form, (otherwise than contained in the letter filed,) at any time, of defendant being ready or willing to deliver molasses, adding, that the molasses was called for by captain Havens, in the usual time of delivery. The latter part of this answer was, on motion, stricken out, as not being closely linked to the fact upon which the plaintiff was interrogated, and the latter took a bill of exceptions. We think that this part of the answer stated a distinct and different fact from that upon which the interrogatory was based, and not necessarily connected with it. The one was in relation to a notice given to the plaintiff, of the defendant's readiness to deliver the molasses; the other relates to an actual call for the molasses, subsequently made by an agent of the plaintiff, as to which fact he was not interrogated.

The evidence shows, in substance, that, in 1839, the defendant made between 140 and 150 hogsheads of sugar, and that there is generally about fifty gallons of molasses made from each hogshead of sugar. That defendant's molasses was contained in two cisterns, a large and a small one; that in December, 1839, Stansberry, the overseer, told defendant that if something was not done with the molasses it would be lost, because the large cistern, which was under ground, would not stand the pressure upon it, being nearly full. To this the defendant answered, that he was waiting for the plaintiff to send him some casks, and was expecting them daily. A few days after, in the beginning of January, a message was brought to the defendant and the overseer, that the cistern had burst and was leaking. On reaching the sugar house they found that the large cistern had given way, that the molasses was oozing out of the cistern, and the water outside running in from above. Nearly all the molasses was lost, except the contents of the small cistern. The overseer states, that the cistern was an old one, made of cypress; that when he examined it, for the purpose of repairing

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it, he found that the grooves at the bottom had given way. There was in it a rent of several inches long, in which he could stick his fingers, and he tried to stop it after the molasses had run out.

D. Olivier testified, that he made the sugar of Richardson in 1839. The cistern gave way in consequence of the pressure of the molasses on it. He saw the cistern after it had burst; very little was left in it. There was in the large cistern the molasses of about one hundred hogsheads of sugar. No good molasses was saved out of this cistern, because it was mixed with water, even before it got full of molasses. He had observed that it leaked, and had cautioned the defendant to get some of it taken out. This warning was given in December, 1839.

Penn declared that he went to Franklin, where the plaintiff resides, in the latter end of December; that Richardson sent word by him to Smith, that his cistern was full, and that he wished him to send up some casks, and that Smith answered, he would send up the casks as soon as the boat of Milcheltre should go by.

Isaac A. Tuttle said, that he was present when the plaintiff made a demand of the defendant, for the payment of the note sued on, in February, or in the spring of 1840, and that he refused to settle, saying that his cistern had burst, and that he had lost his molasses. When a crop of molasses is sold, without any understanding as to the casks, it is admitted to be customary in the country for the buyer to furnish them, to be filled on the plantation of the seller, and delivered on the bank of the water course; until which delivery, says one of the witnesses, they are considered at the risk of the seller.

The question which arises, under these facts and the nature of the defendant's obligation, is, at whose risk, was the molasses, which he was to give in payment of his debt, when the loss occurred? No sale of molasses took place between these parties. The relation between them was that of debtor and creditor simply; but the debtor had stipulated that he should have the privilege of paying in good merchantable molasses, on or before the 1st of January, 1840. If, at that time, or after, or before, he was desirous to pay, and his creditor refused to receive his

payment, his course was a simple one; he had only to make a legal tender of the thing, by the delivery of which he could discharge himself. A great deal has been said, and many authorities referred to, in relation to the manner of putting a debtor *in mora*; but, in our opinion, they have little to do with the present case. The putting *in mora* is a proceeding to which the creditor resorts, when he wishes to compel his debtor to perform his contract, or, in default thereof, to pay damages; while a legal tender is a means given to the debtor to discharge himself from his obligation, by placing the thing to be delivered at the risk of the creditor. A mere notice to the plaintiff to send the casks, admitting that he was bound to furnish them, is not such a tender as could place at his risk the molasses he was to receive in payment. The formalities to be observed by a debtor, in making a tender to his creditor, are laid down with great precision in the Code of Practice. "If the debt be for a specific thing, or for a quantity of any kind of moveable property, which cannot be easily transported, or which are to be delivered at a place designated in the contract, or necessarily indicated by the nature of the obligation, the debtor must give previous notice, in writing, to the creditor that, on such a day and hour, he shall be at the place where the things to be tendered are deposited, in order there to make a delivery of the same to him." Code of Practice, art. 408. "After such notice, the debtor, or his agent, must, on the day and at the hour appointed, be present at the place where the property to be delivered is deposited; and there, in the presence of two witnesses residing in the place, make a real tender of the same to the creditor, by showing them, if he be present, and designating them to him, and by offering to deliver the same to him immediately." Art. 409. "If the creditor refuse to accept the real tender thus made to him, or does not attend on the day, hour, and at the place designated," &c. "the debtor will have the option, either to retain such property in his possession until the creditor demands the same judicially, or to deposit it at the charge and risk of such creditor." Art. 412. The following articles point out the manner of depositing the property, and declare that if it perishes, be spoiled, or its value be diminished, without any fault on the part of the debtor, the loss shall fall on

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the creditor, if the tender be adjudged valid. Arts. 413, 414. In the present case, the notice or letter to the plaintiff specifies no time at which a delivery is proposed to be made; it merely requests him to send casks, and apprises him of the bad condition of defendant's cistern. This the plaintiff did not, and could not consider as a proceeding putting at his risk the molasses, in case he did not immediately go with, or send his casks to receive it. His note had not yet matured, and he did not perhaps consider the danger of a loss, resulting from defendant's cistern being filled, as great as it really was, from its defects and crazy condition. It is shown that the cistern had been leaking for some time, and that the molasses was mixed with water before the cistern was full. This probably created fermentation in it, and caused it to burst. This accident, which happened a few days after the first of January, 1840, might as well have happened a week or two sooner. It resulted from the bad condition of the cistern, which the defendant had been repeatedly cautioned to relieve from the pressure upon it. Not having received any casks from the plaintiff, he should have procured other casks, or taken the necessary steps to avoid the loss. Not having done so, he cannot now be permitted to throw it upon the plaintiff, at whose risk the molasses never was. The obligation of the defendant has, in our opinion, remained in full force, and he is bound to pay it; but he has not, we think, lost the privilege of discharging it in molasses at the market price of January, 1840, which the testimony shows to have been sixteen cents per gallon.

It is, therefore, ordered that the judgment of the District Court be reversed, and that the plaintiff do recover of the defendant four hundred and thirty seven dollars and thirty seven cents, with interest at the rate of ten per cent per annum, from the 18th of May, 1839, until paid, with costs of suit; and that he, the defendant, be allowed the privilege of satisfying this judgment by delivering to the plaintiff, on or before the first day of January, 1846, good merchantable molasses, at the rate of sixteen cents per gallon.

Maskell, and *T. H.*, and *W. B. Lewis*, for the appellant.

Voorhies, for the defendant.

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JOHN SMITH v. SINGLETON W. WILSON and others.

As a general rule, a purchaser who has been evicted can sue only his immediate warrantor. There is an exception to this rule, where the purchaser has been subrogated by the vendor to his action of warranty.

Where a purchaser at a sheriff's sale sells the same property, and, in the act of sale, declares, that he thereby "subrogates the vendee to all the rights and privileges acquired by the sheriff's sale," the latter will be considered as subrogated to the action of warranty to which his vendor was entitled.

Where the vendee of a purchaser at sheriff's sale, subrogated to the rights of the latter, is evicted by a mortgage creditor of the original debtor in execution, he will be entitled, under art. 711 of the Code of Practice, to an action of warranty against both the debtor and creditor in execution, for the reimbursement of the price paid by him; but, upon the joint judgment, he must first take execution against the debtor, and, on its return no property found, may take out execution against the creditor. Art. 713 of the Code of Practice does not apply to such a case. *Per Curiam*: Both parties stand in the same position as if the eviction had taken place in consequence of a better title; and in equity each party is bound, to the extent to which he has profited by the sale, to refund to the purchaser who has been evicted.

The fact that a vendee of a purchaser at a sheriff's sale, subrogated to the rights of his vendor, has recovered judgment against his vendor, on the ground of eviction, for the price paid, is no bar to an action by him against the debtor and creditor in the original execution, where the judgment so recovered has not been satisfied.

APPEAL from the District Court of St. Mary, *Campbell, J.* The petition alleges that, under a *fi. fa.* issued on a judgment obtained by Brashear as curator of the estate of William S. Barr, deceased, against Singleton W. Wilson, one of the defendants in this action, the sheriff sold to John B. Bemiss, certain land, for the price of which Bemiss, in addition to the payment of a conventional mortgage in favor of Lewis Moore for \$800, gave his twelve-months bond for \$700, with interest. That Bemiss sold the land to the petitioner, subrogating him to all his rights and privileges under the sheriff's sale; that an action was subsequently commenced against the petitioner by John Brownson, who claimed to be the holder of certain mortgages existing on the land previously to the sheriff's sale, and while yet in the possession of Moore, by whom it had been sold to Wilson; that a judgment was obtained by Brownson, ordering the land to be seized and sold to satisfy his mortgages; and that, by the

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execution of that judgment, the petitioner has been evicted. The petition concludes with a prayer for judgment against the heirs and representatives of Barr and Wilson, for the sum for which the land was sold at the suit of Brownson, to wit, \$3,618 46. There was a judgment below final as to Wilson, and as in case of non-suit as to the heirs of Barr. The material facts of the case are set forth in the opinion delivered by

BULLARD, J. This action grows out of the same transaction which gave rise to the case of *Smith v. Moore*, decided at the last September term. 10 Robinson, 65. Smith having been evicted of the land purchased by him of Bemiss, and which the latter had acquired at the sheriff's sale, brought this action against the heirs of the seizing creditor, Barr, and the seized debtor, Wilson, relying for his right to recover upon article 711 of the Code of Practice. That article declares that, "if the purchaser has been evicted from the thing adjudged to him, on the ground that it belongs to another person, than the party in whose hands it was taken, he shall, in that case, have his recourse for reimbursement against the seized debtor and the seizing creditor; but upon the judgment obtained jointly for that purpose, the purchaser shall first take execution against the debtor, and, upon the return of such execution no property found, then he shall be at liberty to take out execution against the creditor."

The first ground of defense set up by the defendants, and which is found in the record in the form of an exception, was, that the facts and allegations set forth in the petition, are not such as authorise the plaintiff to maintain this action. That the plaintiff purchased of Bemiss, who is alone bound in warranty to him, and not these defendants.

The general rule now settled is, that the party evicted can sue only his own immediate warrantor; but there is clearly an exception, when the party so evicted has been subrogated to the action of warranty by his vendor. And this leads to the enquiry, whether the subrogation in the deed from Bemiss to Smith, the present plaintiff, carries the action in warranty. The expression in the deed is, "hereby subrogating the said purchaser to all the rights and privileges acquired by virtue of

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the sheriff's sale." Now, we think one of the rights acquired by the sheriff's sale was the recourse in warranty according to the provisions of the Code, and thus the subrogation invested the plaintiff with that right and action, in the event of eviction. It is difficult to imagine to what else the subrogation could apply; because, if we strike out of the deed that clause, still the purchaser would acquire all the right and title of Bemiss to the property sold, together with a right of warranty against him. The clause then, is either unmeaning, which we cannot suppose, or the intention of the vendor was to transfer his action in warranty.

Wilson, one of the defendants, further answers, that the plaintiff has already recovered a judgment against Bemiss, his warrantor, which he pleads as *res judicata*.

There was judgment below for the defendants, and the plaintiff has appealed.

The appellees have not favored us with any argument in support of the judgment, and the reasons given by the judge are very general; but he has distinguished between the two defendants. In relation to Wilson it is final, and a non-suit as to the representatives of Barr. It is stated by the counsel, that the court considered article 713 of the Code of Practice to be applicable. That article provides for the case, where the purchaser is obliged to quit the property sold to him, on the hypothecary action of the creditor who had a legal or judicial mortgage on all the property of the party in execution, or where he has paid the amount of such mortgage, to avoid being dispossessed, and provides that he shall, in such a case, only, have recourse to the *party in execution*, and not to the seizing creditor. On the other hand, article 711 contemplates an eviction in consequence of a better title, and gives an action to the purchaser thus evicted against both the creditor and debtor, but requires the debtor's property to be first discussed. According to this view of article 713, it would be Wilson who alone is liable, and not the representatives of Barr. But this last article does not in terms apply to this case, because it does not appear that there was a general mortgage against all the property of Wilson. On the contrary he was, as it relates to the debt which led to the

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eviction, a third possessor of the property. The mortgage did not result from any debt of his, but from one due by his vendor. Now the sale of the property went to liberate him from a judgment in favor of the estate of Barr, and the estate of Barr profited to that amount. Both parties stand precisely in the same position as if the eviction had taken place in consequence of a better title. Article 713 is clearly not applicable, which exempts the seizing creditor from any warranty in the case supposed. In equity, each party is bound to refund to the purchaser, who has been evicted, to the extent that he has profited by the sale. The price paid by Bemiss, the purchaser at the sheriff's sale, was seven hundred dollars, at a year's credit. That sum was paid to the estate of Barr, and the debtor, Wilson, must be presumed to have profited to that amount, although the judgment against him was something less.

It has been objected to the right of the plaintiff to recover in this case, that he has already recovered a judgment against Bemiss, his warrantor. It is not shown that that judgment has been satisfied, and we are of opinion that the plaintiff, although entitled to be paid but once, has not lost his recourse against the parties to this suit by merely recovering a judgment against his vendor.

We conclude that the plaintiff is entitled to recover against each of the defendants the sum of seven hundred dollars, under the restrictions stated in article 711 of the Code of Practice.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover of the estate of Barr, the sum of seven hundred dollars, and of S. W. Wilson the like sum, with interest at five per cent from judicial demand, and the costs in both courts; provided that no execution shall issue against the estate of Barr, until after the return of a writ of *fiery facias* against Wilson, no property found.

Dwight, for the appellant.

T. H. Lewis and *Voorhies*, for the defendants.

Gonor v. Her Husband.

MARIE DE LA CONCEPTION MARIANNA GONOR v. SIMON GONOR, her
Husband.

Action by a wife for a separation of property, claiming a slave as paraphernal, and opposition by the creditors of the community. Plaintiff offered in evidence a notarial act of sale of the slave, in which the vendor acknowledged the receipt of a sum of money from the plaintiff, as the price. Plaintiff then offered parol evidence to prove that the transaction was in fact a *dation en payement*, and that the slave was given to plaintiff by her mother, as an advance upon her inheritance: *Held*, that the evidence was admissible to prove that the slave was acquired by the funds of the wife, and that, in this respect, it does not contradict the notarial act.

Under the Code of 1808, when a slave formed part of the paraphernal property of the wife, the issue of the slave was also paraphernal. Code of 1808, book 3, tit. 5, arts. 50, 62; book 2, tit. 2, art. 4; book 3, tit. 3, art. 12. Under the Spanish laws, the issue belonged to the community of gains.

The Spanish laws, and the Codes of 1808 and 1825, agree in the general principle, that all property acquired by purchase during the marriage, whether in the name of the husband or wife, belongs to the community, (Febrero, part 2, book 1, ch. 4, §1, no. 6; Code of 1808, book 3, tit. 5, art. 64; C. C. 2371, 2374,) even where the purchase is made with the funds of the wife; but from this rule are excepted things received by either spouse, as a *dation en payement* of money due as a separate and individual right, or purchases made as a *bona fide* reinvestment of money under the wife's control, and forming part of her paraphernal property. Thus a *dation en payement* by a mother, made to the wife, as an advance upon her inheritance, is paraphernal.

APPEAL from the District Court of St. Landry, *King, J.*

Overton, for the plaintiff.

Martin, T. H., and *W. B. Lewis*, for the appellants, opposing creditors.

BULLARD, J. This is a suit for separation of property, founded on the alleged disorder of the husband's affairs. The plaintiff claims, among other things, as her separate property, a mulatress, named Adelaide, and her descendants. She alleges that said slave was conveyed to her, in November, 1811*, by act before Pedesciaux, a notary, by her mother; that although the consideration or price mentioned in the act was two hundred dollars, the estimated value of the girl, then aged only twelve years, yet the same was an advance made to her by her mother, and that, therefore, the slaves are her own separate paraphernal property.

* The plaintiff was married on the 6th of July preceding.

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Fremont, Guidry and Roy, alleging themselves to be judgment creditors of the husband, as head of the community, intervened in the suit, and specially denied the title of the plaintiff to the slaves in question. Their intervention was rejected, and judgment having been rendered for the slaves, together with a sum of money, the creditors appealed.

On the trial the plaintiff gave in evidence a copy of the act of sale, passed before Pedesclaux, from her mother, the widow Vienne, to herself, and accepted by her husband, in which the vendor acknowledges to have received \$200, the price, from the present plaintiff. Her counsel then offered in evidence the depositions of certain witnesses, taken under commission, to prove that the said sale, purporting to be for the price of two hundred dollars, previously paid by the purchaser, was, in fact, a *dation en payement*, and that the slave was given to the plaintiff, by her mother, as an advance upon her inheritance. The intervenors objected, on the ground that parol evidence is inadmissible to vary the nature of the written contract, or to show that the contract was not a sale, as upon its face it purports to be; but the judge presiding admitted the evidence to prove that the slave was acquired with the funds of the wife, and a bill of exceptions was taken.

The question, whether the slave Adelaide and her increase are paraphernal, or belong to the community, must be decided according to the Code of 1808. That Code introduced, we think, some modifications of the Spanish law upon this point. In the case of *Ducrest v. Bijeau*, 8 Mart., N. S. 192, this court held that the increase of a female slave, constituting the paraphernal property of the wife, belongs to the community. That decision is fully sustained by the authorities referred to, and especially by Febrero; but it arose before the Code of 1808. But the case of *Frederic v. Frederic*, 10 Martin, 188, was decided with reference to the Code of 1808, and the court then held, that a child, the issue of a paraphernal slave, follows the condition of the mother, and, as such, is paraphernal. The court in that case referred to page 332, art. 50, of the old Code, which speaks of the young of a dotal slave, and applied the same rule, by analogy, to the young of a paraphernal slave. In this position, we think,

that decision sustained under the Code, particularly by art. 4, page 102, which lays down the broad principle, that "all that is produced by a thing, whether moveable or immovable, belongs to the owner of that thing," and the young of slaves are particularly named. The Code also provides, that the husband, who enjoys the paraphernal property of the wife, is bound by all the obligations of an usufructuary, and it is clear that the young of slaves do not belong to the usufructuary. Page 334, art. 62; page 112, art. 12.

It only remains, then, to enquire whether Adelaide became, by the purchase, the sole property of the plaintiff, or that of community. The sale is in her name, and the vendor acknowledges that she paid the consideration.

The Spanish law, the Code of 1808, and the Code of 1825, agree in the general principle, that all property acquired by purchase during the marriage, whether in the name of the husband or of the wife, belongs to the community. 1 La. 522. Code of 1808, page 336, art. 64. Febrero, part 2, lib. 1, cap. iv. §1, no. 6. 10 La. 148.

This principle applies even when the purchase is made with the funds belonging to the wife. To this there was an exception, which the court recognised in the case of *Savenat et al. v. Le Breton et al.* (1 La., 522), of such things as may have been received by either of them, in payment of money due to them, as their separate and individual rights. A similar exception has been recognised by us, under the existing Code, particularly in the cases of *Domingues v. Lee*, 17 La., 300, and *Terrell v. Cutrer*, 1 Rob., 367.

In this last case, we said, that the purchase made by the wife should be a *bonâ fide* re-investment of money, under her control, and forming a part of her paraphernal property, or a *dation en payement*.

The case now before the court comes within the spirit of the exception, as existing under the Spanish law, as well as the Code of 1825. The act acknowledges that the plaintiff had paid the price. The parol evidence, which was properly admitted, (under the restriction expressed by the judge,) because it does not contradict the act in this respect, shows that Mrs

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Vienne, the mother, made to each of her children a similar advance. It does not appear ever to have been under the control of the husband; and there is no circumstance which creates the slightest suspicion as to the fairness of the transaction.

Judgment affirmed.

DAVID SANDOZ, Administrator of the Succession of Jean Pierre
Décur, v. LOUIS GARY.

The plaintiff in a petitory action can recover only on the strength of his own title.

The *just title* required to enable a possessor to acquire property in a slave by the prescription of five years where the parties are present, and by ten years between absentees, must be one derived from a person whom the possessor honestly believed to be the real owner: and it must be such as would, in its nature, suffice to transfer the property, if derived from the real owner. C. C. 3437, 3439, 3450, 3451.

A slave may be acquired by the prescription of fifteen years without any title on the part of the possessor, and whether he be in good faith or not, and this prescription runs against absentees as well as residents; but the possession must be continuous, uninterrupted, public, unequivocal, and *animo domini*. C. C. 3465, 3466.

A donation of a slave made to a concubine, was not illegal under the Code of 1808. Book 3, tit. 2, art. 10.

APPEAL from the District Court of St. Martin, *Boyce, J.*

MORPHY, J.* This is a petitory action, in which the plaintiff sues to recover the slave Betsy and her children, as the property of the estate of the late Jean Pierre Décur, of which he is the administrator. He avers that the defendant, without any legal right or title, detains these slaves in his possession, and prays that he may be decreed to surrender them to him, and to account to the estate for their hire. The defendant pleaded the general issue, averring that he was the legal owner of the slaves claimed, under a good and valid title, derived from Josephine Décur, a free woman of color, now residing in the kingdom of France, whom he prayed to have cited in warranty, through a curator *ad hoc*. He further pleaded prescription, and that if ever Jean Pierre Décur sold, claimed, or took possession of the slave Betsy, he acted fraudulently, and in bad

* SIMON, J., having been of counsel in this case, did not sit on its trial.

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faith, as he well knew that she belonged to Josephine, whose surety he was when she purchased said slave; that his pretensions, whether based on title or possession, are tainted with fraud, and that neither he, nor his heirs, can set up any right or title to the said slave. The defendant has appealed from a judgment rendered against him below.

The record shows that, on the 19th of May, 1809, Jean Pierre Décuir, emancipated a mulatto girl named Josephine, who was his concubine, and who continued to live with him up to the time of his death. On the 15th of April, 1818, Josephine purchased the slave Betsy at a probate sale of the community property of Jacques J. Ozeune, for \$1100, and Jean Pierre Décuir became her surety, and signed as such the *procès-verbal* of the adjudication. From the time of the purchase, Betsy remained on the plantation where Josephine and Décuir were living together, in the parish of St. Martin, when on the 10th of May, 1823, Jean Pierre Décuir sold this slave and her children to one Isidore Broussard, of the parish of Lafayette, for the sum of \$1500. On his vendee's failing to pay a balance due on the price, he had the slaves seized and sold, and became himself the purchaser of them, at the sheriff's sale, on the 23d of April, 1824. Betsy returned to the plantation in the parish of St. Martin. About the year 1825, Josephine and Décuir left the parish to go to New Orleans, and thence to France, leaving Betsy on the land which had been sold some years before by Décuir to Antoine Abat. It was sold by Abat to Seghers, in March, 1832, and, in May following, Seghers sold it to the present defendant. During all this time, Betsy and her children remained on the place. Some years after the death of Décuir, one François Beauvais, qualified as the administrator of his estate, and, on the 27th of October, 1832, caused an inventory and appraisement to be made of Betsy and her children, as belonging to the estate. From that time, although these slaves continued to live on defendant's land, Beauvais exercised acts of ownership and possession over them. In 1834, Josephine, who had returned from France, brought suit against Beauvais, as administrator, claiming the slaves in dispute as her's; but, in November, 1836, she discontinued her suit. The reason

which induced her to dismiss her action, does not appear in the record, but on the 24th of April, 1838, she transferred all her rights, title and interest in and to these slaves to Louis Gary, who has continued in possession of them up to the institution of the present suit, which was brought on the 31st of March, 1842.

It is well settled that, a plaintiff in a petitory action must exhibit a title in himself, and must recover on the strength of such title. None has been produced, except the sheriff's sale to Jean Pierre Décuir, which is no title at all, as it is one which he made to himself by wrongfully selling the slave whom he knew to be the property of another person, and by buying her in afterwards at the sale made under executory proceedings instituted by himself against his vendee. As it cannot be pretended that these proceedings affected in any way the title of Josephine, under whom the defendant holds, it remains to be enquired whether she has lost it by any of the kinds of prescription known to our law, as it is urged on the part of the appellee. The property of slaves may be acquired by prescription, with or without title. If the possessor is in good faith, and has a just title, prescription will accrue by a possession of five years, as against a person living in the State, and by one of ten years against an absentee. The same species of property is acquired by prescription by fifteen years, without any title on the part of the possessor, or whether he be in good faith or not. Civil Code, arts. 3437, 3438, 3439.

The just title required to enable a possessor to prescribe under it the property of a slave by five or ten years, must be derived from a person whom he honestly believed to be the real owner, and must be such as would, in its nature, be sufficient to transfer the property, if derived from the real owner. Ibid. arts. 3450, 3451. From these provisions of law, it is manifest, that the possession of Décuir, or of his representatives, was never accompanied with good faith, nor founded on a just title. He knew that he was without any right or title to the slave Betsy, and that she belonged to Josephine, for whom he had become surety at the time of her purchase. If then, Décuir, or his estate, has acquired any right to the slaves in dispute, it must

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be by the long prescription of fifteen years, which requires neither title nor possession in good faith; but this prescription, which runs both against residents of the State and absentees, must be continuous and uninterrupted, during all that time; it must, moreover, be public, unequivocal, and *animo domini*. Ibid. arts. 3465, 3466.

The evidence does not satisfy us, that J. P. Décuir, or his heirs, ever had the possession required by the above cited articles of the Code. From 1818 to 1825, during which time, with a short interruption, she resided on the plantation, where both Josephine and Décuir were living together, she must be considered as having been possessed by Josephine, who held the legal title to her; and, in point of fact, the evidence shows that during that period, Josephine exercised over her acts of ownership, and that the slave worked on the plantation almost exclusively for her. After that time, and for several years, she was in the corporeal possession of neither; they had both left the place, which was no longer the property of Décuir. All the slaves belonging to the latter were removed to New Orleans, except Betsy and her children, who remained there until the defendant, Gary, purchased the plantation, in May, 1852. Décuir died about the year 1826, and his heirs do not appear to have exercised any acts of ownership or possession over the slaves in dispute, until 1832, when Beauvais had them inventoried as belonging to Décuir's estate, and began to exercise on them some acts of ownership. Thus it appears that, even should we consider Beauvais as having possessed them for the estate from that period, there would not be, at the inception of this suit, a sufficient length of time to prescribe without title or good faith; but it appears that, at the death of Beauvais, which happened about the year 1837, the estate of Décuir again remained unrepresented for several years, and that the slaves continued to live on the plantation of the defendant, who, in 1838, acquired from Josephine all her right, title and interest in them. It is clear then that the plaintiff, who has shown no legal title to these slaves, has acquired none by prescription. The circumstances disclosed by the record, in relation to Josephine's neglect of her rights, her silence when Décuir sold

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Betey, the state of concubinage in which she lived with him, and her discontinuance of the suit brought in 1835, cannot, in our opinion, destroy or affect her title in a contest with the heirs of said Décur. They cannot have greater rights than their ancestor. He would not surely have been permitted to avail himself of his own wrong, nor would he have been listened to, had he pretended that the adjudication made to Josephine, in 1818, was for his account. If it disguised a donation of this slave by Décur to his concubine, as it is urged by the appellee's counsel, such a donation was not prohibited by the law in force at the time it was made. Code of 1808, p. 210, art. 10.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that ours be for the defendant, with costs in both courts.

Voorhies, for the plaintiff.

I. E. Morse, for the appellant.

PHILEMON C. WEDERSTRANDT v. JONAS MARSH.

A sheriff's sale will not be annulled at the suit of a creditor of the defendant in execution, unless it be shown that the former has been injured thereby. *Per Curiam*: Though the acts of a debtor be illegal and fraudulent, yet if they cause no damage to any one, they will not be annulled.

The nullity resulting from a failure to advertise a sheriff's sale for the time required by law, is not an absolute one, and does not of itself annul the sale. The advertisements may be waived by the written consent of the parties.

Where a plantation is to be sold under execution, the debtor may require that the sale be made on the place itself. C. P. 665.

Where the vendor and vendee of an immovable reside in the same house possession follows title.

APPEAL from the District Court of St. Martin, *King, J.*

GARLAND, J. The plaintiff sues Marsh, on his promissory note, for \$400, and interest. The petition is in the usual form, with an averment that the note was given to secure the price of a sugar mill, sold by plaintiff to defendant. After a prayer for judgment, the petitioner asks that his privilege as vendor may

be recognised, and the mill be sold to pay his demand. The answer of the defendant is a general denial.

Martha M. Taylor intervened in the suit, alleging that she was the owner of the sugar mill, upon which the privilege is claimed, she having purchased it, with other property, seized under writs of execution issued in favor of Kohn, Daran & Co. against Jonas Marsh and others, of Martha M. Taylor, tutrix &c. against Jonas Marsh, and John Devalcourt and others, against Jonas Marsh, being suits Nos. 2945, 3484, 3485, in the District Court of the parish of St. Martin, from the returns on which writs it will appear, that she purchased the plantation and various other property of the defendant, among which is the sugar mill in question. Wherefore she prays to intervene in the case, and oppose the claim for a privilege set up by the plaintiff. The answer of the latter is, a general denial of the allegations in the intervention, and a prayer for its dismissal, with general relief.

The evidence introduced on the trial was the note and protest, and proof of the signature of the defendant. A witness for the plaintiff testified, that the sugar mill formed the consideration of the note, and that it was on the plantation on which defendant resided ever since the date of its delivery, down to the time of trial. That Marsh has repeatedly expressed his willingness to pay one half the note, and that the mill was the consideration of it. This acknowledgment was made within twelve months previous to citation. Witness was the agent between plaintiff and defendant, in the purchase of the mill, and Miller was no party to the transaction, although defendant always contended that he was bound for one half. The intervenor has repeatedly heard witness and Marsh holding conversations in relation to the mill, and the payment of the price, within twelve months. The mill originally cost \$1,500, and was a good one when sold to defendant. It was admitted that the intervenor is the daughter of the defendant, and lives with him. The witness cannot recollect at what particular place he held his conversations with defendant; but he knows that repeated conversations were held, and that the intervenor was present.

In behalf of the intervenor, her execution, as tutrix, &c., against the defendant, was offered in evidence, in the return on

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which the sheriff details his proceedings, and the application of the proceeds of the sale made by him to it and other executions in his hands. The validity and existence of the judgments have not been denied in the argument, nor any question raised as to their correctness. The sheriff returns that he received the execution on the 24th of January, 1844, and, on the 30th of the same month, seized all the right, title and interest of the defendant in and to certain property, which he proceeds to describe, being four tracts of land, containing different quantities, also eleven slaves, seven of whom are fifty years of age and upwards, and all the others, except one, thirty-five years and upwards. Besides these, a quantity of plantation utensils and stock were seized. The sheriff left a notice of seizure with each plaintiff, and with the defendant, notifying each of them of the seizure and day of sale, and requesting them to name an appraiser. On the day of seizure, the plaintiffs in the executions, and Marsh, the defendant, agreed that the property should be sold, on the second Saturday of March, 1844, on the plantation of the defendant, waiving all formalities except that of appraisement. The sheriff advertised the sale at three public places in the parish, and on the day proceeded to offer the property for sale, after appraisement. The property was estimated at \$8,777 50, by appraisers duly sworn and appointed. A certificate of mortgage was exhibited and read, and the property, being a plantation and slaves, with stock and utensils, it appears, was offered for sale in block. There was no bid to two thirds of the appraisement in cash. The parties had entered into an agreement, in writing, that, in the event of the property not selling for two thirds of the appraisement in cash, the sheriff should at once, without further advertisement or formality, proceed to offer it for sale on a credit of twelve months. The sheriff, in pursuance of this agreement, as soon as it was ascertained that two thirds of the appraisement in cash was not bid at the time and place, proceeded at once to offer the property on twelve months credit, when it was adjudicated to Martha M. Taylor, for \$5,550 00. She gave her bond, with security, to Taylor & Devalcourt for \$3,407 98, with interest, to satisfy their execution. The sheriff applied \$1,792 74, to the discharge

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of the execution in favor of Mrs. M. Taylor, as tutrix, &c. ; and for the balance of the sum bid by her, she gave her twelve months bond to the defendant, and the sheriff made her a regular deed, as he states in his return.

The parol evidence shows, that the sale was advertised in the English and French languages, and that, at the time of the sale, and since, Mrs. Taylor was living with the defendant (her father), on the plantation.

On the foregoing facts, the district judge, being, as he says, satisfied that the law and evidence were in favor of the plaintiff, and against the defendant and intervenor, gave a judgment for the former, for the amount of the note, dismissed the petition of intervention, and recognised the privilege of the plaintiff on the sugar mill. From this judgment the defendant and intervenor have appealed.

As to the defendant Marsh, it appears to us that there is no ground of complaint against the judgment rendered against him, and it must be affirmed, with damages ; but as to the judgment against the intervenor, the case is very different.

It is no where alleged in the pleadings, that the sale made by the sheriff is illegal or fraudulent ; nor is it alleged, nor proved, that the defendant is insolvent, or unable to pay his debts. It is not intimated even, that Marsh owed any other debts than those in favor of the creditors in the executions and the present plaintiff, and the return of the sheriff shows, that there was a surplus of the proceeds of the sale, nearly equal to the plaintiff's demand. Thus, without any allegation of fraud, collusion, or nullity of any kind, this court is called on to say, that the proceedings of the sheriff are illegal, the acts of M. M. Taylor and her father collusive and fraudulent, the appraisers guilty of fraud and perjury, and a sale made by an officer of the law absolutely null on its face, and all, at the instance of a creditor, who does not allege, nor prove that he has been injured, or is likely to be injured by the proceedings. The defendant has given good security for a suspensive appeal in the sum of \$600, and as the judgment must be affirmed as to him, we cannot see how the plaintiff can be injured. This court has repeatedly decided that the acts of a debtor may be illegal and

fraudulent, yet if they cause no damage to any one, they will not be annulled.

The counsel for the appellee contends, that the judgment against the intervenor should be affirmed, because the proceedings under the execution were illegal and informal, and the sale fraudulent and collusive. It is not denied, that the judgments in favor of Taylor, Devalcourt and the intervenor against Jonas Marsh were valid and legal, and founded upon real debts; nor is any difficulty made as to the legality of the executions. The seizure appears to us to have been made in the manner required by law. The sheriff in his return says, and a witness testifies, that the sale was advertised at three public places; but the counsel urges that the sale was not advertised for the length of time required by law. It is true, that only twenty seven or twenty eight days elapsed between the posting of the advertisements and the sale, but this defect, in our opinion, is cured by the written consent of the parties to waive the time. If not cured by the consent of the parties, the nullity resulting from it is not absolute, and does not of itself annul the whole sale. The cases cited from 1 Robinson 331, and 5 La. 485, are different from the present in this, that it was the defendants in the executions, or their heirs, who claimed to set aside the sales on the ground of illegal advertisements, and of there being, consequently, no divestment of title, as no consent was given. As to the sale being fraudulent and collusive, we have before said there is no allegation or proof of either, and we do not think it can be inferred from the waiver of a few days in the time for advertising.

It is further objected in the points filed, that there was no legal and proper appraisement of the property, it being falsely and fraudulently appraised at not more than one third of its value; that some articles were not appraised at all, and the sugar mill in question was only appraised at ten dollars. There is no evidence in the record to sustain this serious impeachment of the integrity of the appraisers. They appear to have been sworn according to law, and legally chosen. There is no evidence that they are dishonest men, nor that the property was worth more than the value they placed on it. What

Wederstrandt v. Marsh.

articles were not appraised the counsel has not taken the trouble to designate, nor has he shown the sugar mill was worth more than the appraisement. The plaintiff sold it to the defendant nearly two years before the appraisement, and it had then been used a considerable time. We see nothing on the face of the appraisement that is illegal, and the plaintiff has offered no evidence to prove that it was so. It may be true that the property was appraised and sold for less than its value, but we see no proof of it. A witness states that the day of the sale was a rainy and boisterous one, and that there was no person present but the sheriff, the parties and the appraisers. The defendant required the sheriff to make the sale at his place of residence, which he unquestionably had a right to do. Code of Practice, art. 665. The parties could not foresee that the day would be unfavorable, and that people would not attend to bid for the property. It appears that the appraisement was so high, that no bid, in cash, to the amount of two-thirds of it, could be obtained, and, consequently, the property had to be offered on a credit of twelve months.

As to the sale made at twelve months' credit, without further advertisement, it is not impeached by the plaintiff in his answer, nor even in the points filed by his counsel in this court; and no damage appears to have resulted from it to the plaintiff; it is, therefore, unnecessary to notice it further.

It is said that the defendant has remained in possession of the mill ever since its delivery, and has never parted with the legal possession of the property. It is sufficient to say, in reply to this objection, that the defendant and intervenor resided in the same house, and, that being so, the possession follows the title.

It is ordered and decreed that the judgment of the District Court, so far as it relates to James Marsh, be affirmed, with costs, and ten per cent damages, for a frivolous appeal; but so far as it relates to the intervenor, Martha M. Taylor, it is ordered and decreed that the judgment be annulled and reversed, and that the opposition of Martha M. Taylor to the privilege claimed by the plaintiff on the sugar mill mentioned, be sustained, and his claim rejected; he paying the costs of the intervention in both courts.

Nicholls, for the plaintiff.

Magill, for the defendant and intervenor, appellants.

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ABANDONMENT OF SUIT.

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ACCESSION.

Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Miller v. Michoud*, 225.

ACT SOUS SEING PRIVE.

1. As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the act, as by proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness. *Prevost v. Ellis*, 56.
2. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé* was signed and executed on the day of its date, is insufficient to give it effect from its date, as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*

ADMINISTRATOR.

See SUCCESSIONS.

ADMISSION.

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AGENT.

1. An agent is responsible for any damage that may result from his neglect of duty. C. C. 2971, 2972. *Kirkby v. Armistead*, 81.
2. One who has managed all the business of a succession, under an agreement by which a third person consented to become the security of the plaintiff as

administratrix, on the condition of her trusting the sole management of the estate to the former, will be allowed the usual commissions of an administrator, as an offset, *pro tanto*, against any claim by the plaintiff for a sum coming to her, as the widow of the deceased, from the succession. *Ball v. Hodge*, 390.

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APPEAL.

- I. *From what Judgments an Appeal will lie.*
- II. *When Appeal may be taken.*
- III. *Effect of Appeal in Suspending Execution.*
- IV. *Record of Appeal.*
- V. *Costs on Appeal.*
- VI. *Judgment on Appeal and Damages.*
- VII. *Recourse against Surety on Appeal Bond.*

I. *From what Judgments an Appeal will lie.*

1. Where the amount sued for by the plaintiffs is under three hundred dollars, but that claimed by defendant in reconvention exceeds that sum, the reconventional demand will alone be considered on appeal. *Ex parte Goodwin*, 12.
2. The signature of the judge is required only to final judgments. C. P. 546. Other decrees or orders made in the course of a suit, may be entered on the minutes, and, where they may cause irreparable injury, may be appealed from, though not signed. C. P. 544. *Kræutler v. Bank of United States*, 160.
3. A garnishee having answered the interrogatories propounded to him, took a rule on plaintiffs to show cause why he should not be allowed to file a supplemental answer. Plaintiffs averring that the answer filed by the garnishee was evasive and insufficient and amounted to a judicial confession in their favor, and cannot be done away with by any subsequent answer, that measures have been taken to fix the liability of the garnishee by obtaining an order directing him to deliver to the sheriff a transfer-warrant for certain shares of stock held by him for the defendants, and that the supplemental answer came too late, moved for a judgment against the garnishee for the amount claimed by them. The supplemental answer was allowed to be filed, and the motion for a judgment against the garnishee overruled, by an order entered on the minutes, but not signed. On appeal by plaintiffs: *Held*, that the appeal must be dismissed, the judgment being an interlocutory one, not producing irreparable injury. *Ib.*
4. No appeal will lie from a judgment on an opposition by a third person, claiming to be paid by preference to the mortgage creditor out of the proceeds of property sold under an order of seizure and sale, where the amount claimed by

the opponent is only three hundred dollars, though the claim for which the order of seizure and sale was issued exceed that amount.

Citizens' Bank of Louisiana v. Brothers, 217.

5. An appeal will lie from an interlocutory judgment which may work irreparable injury. *Duplessis v. Lastrapes*, 451.
6. Plaintiffs, alleging that a servitude exists on the lands of the defendants, by the terms of the original grant under which they hold, by which the owners are bound to construct and keep in repair forever a certain bridge and road, obtained a judgment, declaring the servitude to exist, and ordering the defendants to keep the bridge and road at all times in repair. There was no allegation in the petition or answer, as to the value of the servitude: nor were any damages claimed or proved. On an appeal by defendants: *Held*, that there being nothing to show that the court has jurisdiction, the appeal must be dismissed. *Police Jury of St. Landry v. Fontaine*, 476.
7. No appeal will lie from a judgment refusing a continuance; if improperly refused, the error may be corrected by appeal from the final judgment. *C. P. 566. Gautret v. Constant*, 486.

II. When Appeal may be taken.

8. A non-resident may appeal at any time within two years from the day on which final judgment was rendered (*C. P. 593*); and where the plaintiffs allege in their petition and affidavit for an attachment, that the defendants reside out of the State, they will be concluded thereby.

Krautler v. Bank of United States, 213.

III. Effect of Appeal in Suspending Execution.

9. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. Judge of City Court of New Orleans, 394.

IV. Record of Appeal.

10. Where the clerk of the court from which an appeal has been taken certifies, in his answer to a *certiorari*, that several pages of the note of the evidence, made by the judge to serve as a statement of facts, have been lost, so that the record cannot be completed, the case will be remanded for a new trial.
Evins v. Murphy, 477.
11. A case will not be decided on its merits, unless the record contain all the evidence upon which it was tried below; and where it is not the appellant's fault that the record is incomplete, he will be entitled to relief. *Ib.*
12. Where the record of appeal was not filed for more than twelve months after the return day, no application having been made for further time, and it is not pretended that the appellant was prevented from filing it sooner by any event not under his control, the appeal will be dismissed. *Littell v. Dolbear*, 485.

V. Costs on Appeal.

13. Security for the costs of the clerk of the Supreme Court is not required by any law, but by a rule of court. Under this rule the clerk may refuse to receive the transcript, unless security be given. But if received, without objection on account of want of security, he cannot afterwards consider the transcript as not filed, at least until the appellant has been put in default, by a demand of security. *Rivarde v. Palfrey*, 282.

VI. Judgment on Appeal and Damages.

14. The Commercial Court of New Orleans has no jurisdiction of petitory or possessory actions. Act of 14 March, 1839, s. 3. But where an exception to its jurisdiction on that ground, has been improperly overruled below, the Supreme Court will examine and decide the case on its merits, under the fourth section of the act of 14th March, 1839, which declares that "no judgment rendered in the Commercial Court shall be void for want of jurisdiction, but in case it be determined that the court had not jurisdiction of the case, the court to which the appeal is taken shall condemn the plaintiff to pay all costs in the court of the first instance, though a judgment may be rendered in the Supreme Court in his favor."

Second Municipality of New Orleans v. Garland, 387.

15. Though an appeal be taken by defendant merely for delay, no damages can be allowed unless prayed for by the appellee. *Gradenigo v. Hicks*, 481.

VII. Recourse against Surety on Appeal Bond.

16. No recourse can be had on the sureties in an appeal bond, until it be clearly shown by the creditor, that the proceeds of the sale of all the estate and effects of the principal have proved insufficient to discharge his demand. So, where a husband appeals from a judgment against him for a community debt, and dies, leaving children and a widow who accepts the community, the sureties on the appeal bond will be liable only in case the judgment is not satisfied by the widow and heirs so far as they are respectively bound for it, and cannot be satisfied by the sale of all their property, real and personal, liable for its payment. *Saulet v. Trepagnier*, 266.

ARREST.

- A non-resident debtor arrested under the 2d section of the act of 28 March, 1840, having been released on executing a bond, in pursuance of the first section of the amendatory act of the same date, with surety, the condition of which was that he should not depart from the State within three months without leave of the court, on a rule against the bail to show cause why he should not be condemned to pay the amount of the judgment, it was proved that the debtor had left the State within the three months, and that a *fi. fa.* against him had been returned *nulla bona*, but that he was present in court on the trial of the case, and offered to surrender himself in discharge of his bail: *Held*, that the offer to surrender cannot avail the surety, as, since the acts of 1840, no officer had authority to take the principal into custody on such surrender; and that the departure of the latter from the State, within the three months, and the return of a *fi. fa.* against him unsatisfied, fixed the liability of the surety.

Lindley v. Hagens, 204.

ATTACHMENT.

1. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. *C. C. 2794*. But a creditor of one partner cannot seize under execution, or attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Bank of Tennessee v. McKeage*, 130.
2. A creditor of a residuary legatee, or devisee, of one whose succession is being administered in another State, cannot attach specific property of the succession, while still in possession and under the control of the executor, and the estate not yet fully administered. The property must be considered as the executor's, for the purposes of his trust. *Thornhill v. Christmas*, 201.
3. Defendants having attached certain bank bonds and notes belonging to plaintiffs, and having recovered judgment in the court below, caused them to be sold under a *fi. fa.* The judgment was reversed on a devolutive appeal. Plaintiffs, in an action for damages for the illegal attachment, having proved that the bonds and notes had fallen in value pending the seizure, and that they were sold for much less than they might have been sold for had no attachment been issued: *Held*, that the defendants should pay the actual damages caused by their attachment. *Horn v. Bayard*, 259.
4. A garnishee is but a stakeholder; he has nothing to do, but to take care of himself. He cannot interfere between the plaintiff and defendant, nor others claiming what he holds or owns, but must pay to whomsoever the court may order him. *Hazard v. Agricultural Bank of Mississippi*, 326.
5. Where a debt due to defendants by a note secured by mortgage, had been transferred to third persons by a notarial act recorded in the office of the parish judge, but before notice of the transfer was given to the maker of the note, the debt was attached by a creditor of defendants, the attaching creditor will be entitled to be paid by preference out of the proceeds. *Ib.*
6. Debts due to a foreign corporation may be attached. *Ib.*

ATTORNEY AT LAW.

1. The Commercial Court of New Orleans has no jurisdiction of proceedings to cancel the license of an attorney at law. *Chevalon v. Schmidt*, 91.
2. The license of an attorney at law cannot be withdrawn or annulled, unless on conviction in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicile of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1. *Ib.*
3. A syndic of the creditors of an insolvent, though himself an attorney and counsellor at law, may procure the assistance of counsel in cases in which he needs it. He is a judge of the necessity; and where the value of the servi-

ces is proved, and it is not shown that such assistance was improperly sought, the fees of the counsel must be paid out of the estate surrendered.

Wilcox v. His Creditors, 346.

4. A note executed by a married woman, without the authorisation of her husband or of the judge, for the fees of counsel employed by her to institute a suit against her husband for a separation of property, is not binding on her. C. C. 123, 127, 129, 1775, 1779. The order of the judge, authorising her to sue, cannot be considered as empowering her to contract with any one with reference to the suit. But where a suit for separation has been actually brought, the attorneys employed by her may sue, on a *quantum meruit*, for the value of their services. *Crow v. Yocom*, 506.

BANK.

I. *Banks generally.*

II. *Union Bank of Louisiana.*

I. *Banks generally.*

1. The powers and the duties of the officers of a bank being defined by its charter and by-laws, they will, when acting within the sphere of their respective duties, represent the corporation, and bind it by their acts; but in other matters they can only represent, or act for, it when authorised by a resolution of the board of directors. *Reed v. Powell*, 98.
2. A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for a syndic. A resolution of the board of directors can alone empower him to do so. But a ratification by the directors of the acts of a cashier who had voted at a meeting of creditors without authority, made after the proceedings before the notary were closed and the ten days had expired after which the rights of the parties claiming the syndicism became fixed, cannot affect rights previously acquired. C. C. 1789, 2252. Act 20 February, 1817. *Ib.*
3. The managers of a bank appointed under the provisions of the 29th section of the act of 14 March, 1842, providing for the liquidation of banks, may be sued for any cause of action, though arising under the administration of former boards of directors. *Gaillard v. Citizens Bank of Louisiana*, 168.
4. Though a bank has been put in liquidation under the 29th section of the act of 14 March, 1842, and an order has been made staying all proceedings against it, a creditor may sue the bank in the court before which the proceedings for liquidation are pending, where he only prays for a judgment recognising his claim, and ordering it to be paid in course of administration. *Ib.*
5. Action by a bank, in liquidation under the acts of 14 and 26 March, 1842, to recover the amount of a dividend due on stock held by it in another corporation, to which it was indebted in a larger sum for money on deposit: *Held*, that the claim of the bank was discharged by compensation. Act 5 April, 1843, s. 2.

Citizens' Bank of Louisiana v. Levée Steam Cotton Press Company, 286.

II. *Union Bank of Louisiana.*

6. Under the 24th section of the act of 3 April, 1832, incorporating the Union

Bank of Louisiana, the right of the bank to seize and sell property mortgaged to it for stock or loans, is not impaired by the death of the mortgagor; and the bank may proceed to enforce the sale of the property *via executiva*, where it has a title importing a confession of judgment, or *via ordinaria* by obtaining a judgment against the representatives of the mortgagor (C. P. 61, 63, 64,) when it has no such title, and these proceedings, to avoid the delays and formalities from which it was the intention of the legislature to relieve the bank, must necessarily be before the ordinary tribunals, as a Court of Probates can issue no order of seizure and sale, nor *fi. fa.*, and can only order the sale of the property and payment of the debt in due course of administration. C. P. 986, 987, 990, 991, 993. The words "*according to law*," in the 24th section, refer to the seizure and sale authorised by that section, and mean that all the requirements of the law as to notice, appraisement, advertisement, &c. must be complied with—not that payment must be sought in the Probate Court, concurrently with the other creditors of the deceased. If the proceeds of the sale of the mortgaged property should not pay the whole claim, the bank must go into the Court of Probates for the balance, and, if the claim should not be admitted, sue the representatives of the deceased in that court; and this, whether the original proceedings were *via executiva* or *via ordinaria*.

BANKRUPT.

1. A bankrupt, discharged by a District Court of the United States under the act of 1841, has a right to have the mortgages, recorded against him for the purpose of securing debts from which he has been discharged, erased, so far as they may effect his future property. And where a rule has been taken in the District Court on the recorder and the mortgagees, to show cause why the mortgages should not be erased, and no cause has been shown, and the rule has been made absolute, and the recorder refuses to make the erasure, a mandamus may be obtained from a state court to compel him to do so. *Per Curiam*: As the debts secured by the mortgages cannot be recovered but in the event of the certificate being annulled for fraud, it is unjust, in the absence of any such charge, that the mortgages should stand recorded as operating on the future property of the bankrupt. *Diggs v. Prieur*, 54.
2. A wife having obtained a judgment of separation of property, levied a *fi. fa.* on the property of the husband, who subsequently applied for the benefit of the bankrupt act of Congress, of 19th August, 1841, and was discharged. The wife's execution not having been satisfied in full: *Held*, that the balance of the debt due by the husband, was extinguished by his discharge.

Aling v. Fgan, 244.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Power to draw or endorse in the name of another.*
- II. *Presentment for payment, Protest and Notice.*
- III. *Release of a Party.*
- IV. *Evidence in Actions on Bills and Notes.*
- V. *Defence to Actions on Bills and Notes.*

I. Power to draw or endorse in the name of another.

1. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the rest. To draw or endorse a note in the name of the partnership, the authority must be express and special.

Carr v. Woods, 95.

II. Presentment for payment, Protest and Notice.

2. It is not indispensable that demand of payment of a note or bill should be made, and notice of non-payment given, by a notary. *Follain v. Dupré*, 454.
2. The acts of 14 March, 1823, and 13 March, 1827, authorising notaries, parish judges, and, in some cases, justices of the peace, to protest and give notice of the protest of bills and notes, have introduced no new rule as to demand of payment, or the diligence to be used in giving notice of protest. They merely introduced a new mode of proof, unknown to the commercial law. *Ib.*
4. A presentment of a bill or note for payment, and notice of non-payment given by an agent of the holder, or by any person lawfully in possession for the purpose of demanding payment, is sufficient. *Ib.*
5. A notary to whom an inland bill had been given to demand payment, testified, that he called on the day of payment, during the usual business hours, at plaintiff's counting-house, which was named, on the face of the bill, as the place of payment, but found no one there, and that he waited a short time without seeing any one of whom he could make a demand; that he afterwards sent his clerk to make a demand, who returned the note to him unpaid; and that one of the plaintiffs soon after came to the notary's office, where he demanded payment of him, and was informed that the bill could not be paid: *Held*, that the demand made of one of the plaintiffs at the notary's office, and his answer, show that the note would not have been paid though he had waited longer, or some one been present when he called at the place of payment; that no injury resulted to the endorser; and that the demand was sufficient. *Ib.*
6. A demand of payment of an inland bill, made by the clerk of a notary to whom the bill had been given for the purpose of making a demand and giving notice in case of dishonor, is sufficient. The notary had a right to appoint a substitute, for whose acts he was answerable; and where, in such a case, the notices of non-payment were made out by the notary, and deposited in the post office by the clerk, the notice will be good. *Ib.*
7. The provisions of the statute of 13 March, 1827, requiring notice of protest to be sent to an endorser at his usual residence or domicile, are the same as those of the commercial law. The domicile of a citizen being, according to art. 42 of the Civil Code, the parish in which he habitually resides and has his principal establishment, notice must be directed to him there, or sent to some post office within the parish, unless there be a post office nearer to his actual residence in an adjoining parish or State, in which case it may be directed to the latter, the domicile of the endorser being mentioned. *Ib.*
8. The rule of the commercial law, that a notice of protest must be sent to the post office nearest to the actual residence of the endorser, and that the holder must use due diligence to discover his domicile and the nearest post office, is, so far as it requires that the notice shall be sent to the nearest post office, sub-

ject to many exceptions, one of which is where the party to be notified is in the habit of receiving his letters at a more distant office, or by a more circuitous route, and that fact be known. The great object of the law is to give notice in as speedy and convenient manner as it can be done; and when there is a reasonable compliance with this rule it is sufficient. *Ib.*

9. It is not absolutely necessary that a notice of protest should be directed to an endorser at the post office nearest to his residence, where he receives his letters and papers from two offices, and the difference in their distance from his residence is but little. In such a case, a notice directed to either will be good. *Ib.*
10. In an action against the endorser of a bill, it was proved that he was in the habit of receiving his letters from two post offices, both of which were in the parish of his domicile, but one about a mile nearer to his residence than the other; that, supposing him to apply at the two offices every mail day, he would receive letters, if sent to him through the farthest office, from ten to eighteen hours sooner than if directed to the nearest; and that he had instructed the postmaster at the farthest office to retain all letters which might come to his office for him: *Held*, that a notice of protest directed to the endorser at the farthest office was sufficient. *Ib.*
11. Where it is proved that defendant had declared "that his residence is the parish of S—," and that, by the laws and regulations of the post office department, all letters directed to that parish, without specifying any particular office, are sent to a post office from which he was in the habit of receiving his letters, a notice of protest directed to him, as the endorser of a bill, at that parish, will be sufficient. *Ib.*

III. Release of a Party.

12. Where the holder of a note, in consideration of a partial payment by the drawer, grants him an extension of time for the balance, without the consent of the accommodation endorser, the latter will be discharged. C. C. 3032.

Freeman v. Profilet, 33.

IV. Evidence in Actions on Bills and Notes.

13. In an action against the endorser of a note, the signature of the maker need not be proved. *Young v. Patterson*, 7.
14. In an action against the endorser of a note, the notary who had protested it certified, that he had left notices of the protest at the counting-house of defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. A witness introduced by defendant swore, that he was the only clerk of the latter at the maturity of the note, and that he never received any notice of protest. *Per Curiam*: This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which it must be presumed was sealed, and the witness thus prevented from knowing its contents. *Ib.*
15. The evidence of a witness who states that he verily believes that notice of the neglect or refusal of the acceptor to pay a bill at maturity was given to the drawer, but does not say how it was given, nor assign any reason for his

belief, nor state any facts from which the court may judge of the sufficiency of the notice, is not sufficient proof of notice.

Krautler v. Bank of United States, 213.

16. Where a plaintiff relies on the protest and certificate of a notary, under the act of 13 March, 1827, to prove a demand of payment and notice of protest, parol evidence is inadmissible to explain, contradict, or add to the written evidence; nor can a portion of such evidence be used to make out one part of the case, and the testimony of the notary, as to any thing required by law to be inserted in such acts, to make out another part. As to any other facts, the notary is competent. But a plaintiff may offer the protest and certificate in evidence, and the parol testimony of the notary to prove a demand and notice, with the view, in case the protest and certificate should be insufficient under the statute, to rely on the parol evidence alone. If the protest and certificate be imperfect and insufficient under the statute, they are not the best evidence, and, consequently, parol testimony cannot be excluded as secondary.

Follain v. Dupré, 454.

17. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

18. A protest by a notary of a domestic bill or promissory note for non-acceptance or non-payment, and his certificate of notice to the endorser, are inadmissible under the general commercial law. They are only received where there is a statute or local law authorising their admission. By the act of the legislature of this State, of 13 March, 1827, a notary is authorised to do what the holder of the bill or note is required, under the commercial law, to do himself, and to certify the facts officially; but the mode of proof authorised by the statute is not exclusive. *Ib.*

19. In an action against the endorsers of a note, the notary's certificate, offered in evidence, recited that he had notified the protest "à MM. H. D. et F., aux Opelousas, endosseurs du billet, au moyen de six notices écrites adressées auxdits H. D. et F., respectivement; trois desquelles, adressées comme dû est, j'ai mises à la poste à V.," etc. Held, that the certificate must be construed to mean that three of the notices of protest were deposited in the post office at V., addressed to the endorsers at Opelousas; and that the proof of notice is sufficient.

Union Bank of Louisiana v. Daniel, 480.

20. Where the protest of a notary is offered in evidence to prove a demand of payment of the makers of a note, it must appear from the protest itself that the notary had the note in his possession, and demanded payment at the proper place and from the proper party. The answer of the party of whom the demand was made, must also appear in the protest. *Dupré v. Richard*, 495.

See 3 *supra*.

V. Defence to Actions on Bills and Notes.

21. Fraud in obtaining an endorsement, is no defence to an action against the endorser, by one to whom the note had been transferred in the usual course

of business, for a good consideration, without notice, unless fraud or collusion can be proved as to him. *Follain v. Dupré*, 454.

22. Action against the endorser of a note, signed, after the dissolution of the firm, by one of the partners, without authority from the others, in the social name. It was proved that the note was executed at the request of the endorser; that he knew that the partnership was dissolved at the time; and that the note was given for the purpose of renewing one previously endorsed by him for the benefit of the partnership: *Held*, that the fact that the partner who made the note had no authority to bind the partnership, does not discharge the endorser, the partner who signed the social name having, at least, bound himself; that every endorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill, in favor of the holder, on the acceptor or obligor; and that a *bona fide* holder or endorsee may exercise his recourse against his endorser, without regard to previous parties to the note or bill, unless privity is shown between the endorsee and drawer, as to some fraud or illegality which the endorser may set up as a defence. *Dupré v. Richard*, 497.
23. An order written by the maker on the back of a promissory note, while in the hands of an endorsee to whom it had been transferred after maturity, requesting a third person to pay the note on a day named, is a mere indication by the debtor of a person who is to pay in his place, and does not operate a novation of the debt. On the failure of the person indicated to pay, the maker will be responsible. C. C. 2188, 2190. *Muggah v. Rogers*, 511.

CARRIERS.

See LETTING AND HIRING, 6, 7.

CLINTON AND PORT HUDSON RAILROAD COMPANY.

1. By an act of 28 March, 1839, for expediting the construction of the Clinton and Port Hudson Railroad, it was provided (sec. 2,) that certain bonds of the State should be loaned to the company, on condition that it should agree, "in case said bonds, and the interest thereon, are not punctually paid according to the provisions of this act, that the railroad constructed by the company shall, by the mere failure to pay said bonds (or either of them, s. 4,) and the interest thereon, and the payment thereof by the State, become the property of the State." An act of 8 March, 1841, after reciting that the bonds so loaned had been sold by the company, and that a portion of the first instalment of interest on said bonds is due and unpaid, and that the company is unable to pay the same, directs (s. 1,) the treasurer of the State to pay the interest so due; and declares, (s. 2,) "by virtue of the second and fourth sections of the act of 1839, the said road, with all the machinery, fixtures, slaves and appurtenances thereunto belonging or appertaining, to be forfeited to the State." *Held*, that so much of the act of 8 March, 1841, as declares the road, with the machinery, fixtures and slaves, forfeited to the State, is unconstitutional, and confers no right whatever on the State; and that the question whether there has been a forfeiture or not, is one for judicial enquiry and decision.

Perry v. Commissioners of Clinton and Port Hudson Railroad Company, 412.

2. The powers and duties of the commissioners appointed by the Governor to

liquidate the affairs of the Clinton and Port Hudson Railroad Company, under the act of 26 March, 1842, ch. 159, are defined by the second section of the act, which declares that the liquidation of its affairs shall be conducted according to the provisions of the act, "to provide for the liquidation of banks," of 14 March 1842, ch. 98. *Ib.*

3. So much of the sixth section of the act of 25 March, 1844, ch. 83, as directs the treasurer of the State to sell the property, privileges and immunities of the Clinton and Port Hudson Railroad Company, was enacted under the erroneous impression that the property and privileges of the Company were legally vested, by forfeiture, in the State. The legislature had no power to direct the sale of the property. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. Code of 1808.

II. Civil Code.

III. Code of Practice.

I. Code of 1808.

- Book II, tit. 2, art. 4. Accession. *Gonor v. Her Husband*, 526.
 ———— 3, art. 12. Usufruct. *Ibid.*
 ———— III, tit. 1, art. 59. Successions. *Beale v. Walden*, 67.
 ———— 2, art. 59. Donations *inter vivos*. *Lagrange v. Barré*, 302.
 ———— 5, arts. 50, 62, 64. Husband and Wife. *Gonor v. Her Husband*, 526.
 ———— 6, arts. 54, 57. Sale. *Succession of Durnford*, 183.
 ———— 39, arts. 75, 76. Prescription. *Campbell v. Nichols*, 16.

II. Civil Code.

11. Effect of laws for preservation of public order or good morals. *Lagrange v. Barré*, 302.
 12. Nullity of acts contrary to prohibitory laws. *Ibid.*
 42. Domicil. *Follain v. Dupré*, 454.
 123, 127, 129. Husband and Wife. *Crow v. Yocom*, 506.
 305, 308. Family meeting. *Beale v. Walden*, 67.
 320, 328. Minor. *Mayes v. Smith*, 503.
 334, 335, 337. ———— *Richard v. Deuel*, 508.
 356. Minor, prescription of action by, against tutor. *Offutt v. Collins*, 491.
 455. Immoveables. *Miller v. Michoud*, 225.
 497, 498, 500. Accession. *Ibid.*
 929. Successions. *Beale v. Walden*, 67.
 1043 1051. ———— *Richard v. Deuel*, 508.
 1484, 1489, 1490, 1491, 1504, 1513, 1520, 1547. Donations. *Lagrange v. Barré*, 302.
 1674. Executors. *Baldwin v. Carleton*, 109.
 1775, 1779. Contracts. *Crow v. Yocom*, 506.
 1789. ———— *Reed v. Powell*, 98.
 1804. ———— *Succession of Risley*, 298.
 1963, 1934. ———— *Barker v. Phillips*, 190.

1973. Contracts. *Ibid.* *Lafleur v. Hardy*, 493.
 1974, 1977. ——— *Barker v. Phillips*, 190.
 1982. ——— *Succession of Risley*, 298.
 1984, 1985. ——— *Succession of Baum*, 314.
 1989. Prescription of action to annul contracts. *Succession of Risley*, 298. *Succession of Baum*, 314.
 2041. Contracts. *Stevens v. Fisk*, 18.
 2129. Payment. *Beasley v. Allen*, 502.
 2136. ——— *Macarty v. Gasquet*, 270.
 2156, § 2. Conventional subrogation. *Wilcox v. His Creditors*, 346.
 2173. Cession of property. *Gurlie v. Flood*, 166.
 2186. Novation. *Czarnowski v. Czarnowski*, 9.
 2188, 2190. ——— *Muggah v. Rogers*, 511.
 2252. Contracts. *Reed v. Powell*, 98.
 2256. Parol evidence. *Succession of Tilghman*, 124. *Macarty v. Gasquet*, 270.
 2280. Quasi-contracts. *Beasley v. Allen*, 502.
 2371. Husband and Wife. *Broussard v. Her Husband*, 445. *Gonor v. Her Husband*, 526.
 2374. ——— *Succession of Baum* 314. *Gonor v. Her Husband*, 526.
 2378. ——— *Saulet v. Trepagnier*, 266.
 2379. ——— *Ibid.* *Succession of Baum*, 314.
 2414, 2417. Sale. *Thomson v. Mylne*, 349.
 2427. ——— *Campbell v. Nichols*, 16.
 2431, 2437, 2442 ——— *Thomson v. Mylne*, 349.
 2476. ——— *Thomas v. Clement*, 397.
 2586. ——— *Macarty v. Gasquet*, 270.
 2612, 2613. ——— *Succession of Risley*, 298.
 2622. ——— *Succession of Tilghman*, 124.
 2641. Letting and hiring. *Fisk v. Moores*, 279.
 2644. ——— *Miller v. Michoud*, 225.
 2656. ——— *State v. Judge of City Court of New Orleans*, 394.
 2672, 2676. ——— *Miller v. Michoud*, 225.
 2683. ——— *State v. Judge of City Court of New Orleans*, 394.
 2722, 2725. Carriers. *Logan v. Ponchartrain Railroad Company*, 24.
 2780, 2781. Partnership. *Bank of Tennessee v. McKeage*, 130.
 2794. Partnership. *Ibid.* *Thomson v. Mylne*, 349.
 2835. ——— *Thomson v. Mylne*, 349.
 2971, 2972, 2973. Mandate. *Kirkby v. Armistead*, 81.
 3008. Surety. *Ball v. Hodge*, 390.
 3032. ——— *Freeman v. Profilet*, 33.
 3152. Privilege. *Fisk v. Moores*, 279.
 3162, 3163. ——— *Barkley v. His Creditors*, 28.
 3194, 3214. ——— *Laughlin v. Ganahl*, 140.
 3238. ——— *Duplessis v. His Creditors*, 4.
 3256. Mortgage. *Miller v. Michoud*, 225.
 3297. ——— *Delavigne v. Gaienné*, 171.

3314. Mortgage. *Duplessis v. His Creditors*, 4.
 3317. ——— *Ibid. Delavigne v. Gaienné*, 171.
 3318, 3333, 3374. ——— *Commissioners of New Orleans Improvement and Banking Company, v. Jewett*, 20.
 3437, 3438, 3439, 3450, 3451. Prescription. *Sandoz v. Gary*, 529.
 3452, 3453. ——— *Prevost v. Ellis*, 56.
 3465, 3466. ——— *Sandoz v. Gary*, 529.
 3472, 3473, 3474. ——— *Campbell v. Nichols*, 16.
 3484, 3485. ——— *Dunn v. Kenney*, 249.
 3499, 3503. ——— *Keaghey v. Barnes*, 139.
 3507. ——— *Dunn v. Kenney*, 249. *Lagrange v. Barré*, 302.
 3522, § 21. Signification of term inofficious. *Lagrange v. Barré*, 302.

III. Code of Practice.

- 61, 63, 64. Hypothecary action. *Union Bank of Louisiana v. Marigny*, 209.
 93. Jurisdiction. *Fleming v. Hiligsberg*, 77.
 120. Parties to action. *Musson v. Richardson*, 37.
 149. Inconsistent demands. *Montross v. Hillman*, 87.
 163. Actions where to be brought. *Second Municipality of New Orleans v. Garland*, 387.
 198. Service of copy of petition and citation. *Mississippi Marine and Fire Insurance Company v. Bank of Louisiana*, 47.
 230, 231, 233. Arrest. *Lindley v. Hagens*, 203.
 275, 276. Sequestration. *Sellick v. Kelly*, 145.
 344, 345. Peremptory exceptions. *Montross v. Hillman*, 87.
 364. Intervention and opposition of third persons. *Succession of Baum*, 314.
 389, 390, 391. Intervention. *Hazard v. Agricultural Bank of Mississippi*, 326.
 396, 397, 401, 402. Opposition of third persons. *Sheldon v. New Orleans Canal and Banking Company*, 181.
 403. ——— *Commissioners of New Orleans Improvement and Banking Company v. Jewett*, 20.
 408, 409, 412, 413, 414. Real tender. *Smith v. Richardson*, 516.
 544, 546. Judgment. *Kræutler v. Bank of the United States*, 160.
 579. Appeal. *Saulet v. Trepagnier*, 266.
 566. ——— *Gautret v. Constant*, 484.
 606. Nullity of judgments. *Musson v. Richardson*, 37. *Fleming v. Hiligsberg*, 77.
 608. ——— *Fleming v. Hiligsberg*, 77.
 647. *Fieri facias*. *Succession of Tilghman*, 124.
 665. ——— *Wederstrandt v. Marsh*, 533.
 690. ——— *Succession of Tilghman*, 124.
 711, 713. ——— *Smith v. Wilson*, 522.
 829, 839. Mandamus. *State v. Parish Judge of Plaquemines*, 285.
 924. Courts of Probate. *Fleming v. Hiligsberg*, 77. *Union Bank of Louisiana v. Marigny*, 209.
 983. Settlement of Successions. *Fleming v. Hiligsberg*, 77.
 986, 987, 990, 991, 993 ——— *Union Bank of Louisiana v. Marigny*, 209.

1007. Accounts of curators, executors &c. *Succession of Durnford*, 183.
 1035. Actions before Courts of Probate. *Gautrel v. Constant*, 486.

COMPENSATION.

1. Action by a bank, in liquidation under the acts of 14 and 26 March 1842, to recover the amount of a dividend due on stock held by it in another corporation, to which it was indebted in a large sum for money on deposit: *Held*, that the claim of the bank was discharged by compensation. Act 5 April, 1843, s. 2. *Citizens Bank of Louisiana v. Levée Steam Cotton Press Company*, 286.
2. A plea of compensation is in the nature of a demand, and should be accompanied with a specification of the particular amount expected to be compensated, of the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands. *Wilcox v. His Creditors*, 346.

See COURTS, 8.

CONSTITUTION OF LOUISIANA.

- Art. 4, sect. 2. Jurisdiction of Supreme Court. *State v. Parish Judge of Plaquemines*, 285.
 — 6, sect. 8. Duration of offices. *Cruzat v. Davis*, 264.

CONSOLIDATION OF ACTIONS.

The defendant in an action for an amount claimed for drayage, having previously sued plaintiff, in another court, for a sum alleged to be due to him also for drayage, it was agreed between the parties that the latter suit should be transferred to the court in which the first was pending, to be tried immediately after the first suit. The two suits were ordered by the court to be consolidated and tried together. *Held*, that, when the suit was filed in the court to which it was transferred, it became a part of its records, and was under its control in the same manner as if it had originated there, and that the two actions were properly consolidated. *McGawley v. Gannon*, 164.

CONTRACTS.

1. A resolutive condition is implied in all commutative contracts, to take effect in case either party fails to comply with his engagements. C. C. 2041.
Stevens v. Fisk, 18.
2. A stockholder in an insolvent company, a part of whose subscription is unpaid, cannot, by a donation to an insolvent individual, made to get rid of his liability for such unpaid stock, avoid responsibility as a stockholder. A creditor, having a *feri facias* against the company, may proceed against him in the manner pointed out by the 13th section of the act 20th March, 1839, and, on proving that the donation was not real, recover judgment for any balance due on the stock. *Mandion v. Firemen's Insurance Company of New Orleans*, 177.
3. Where stock, on which a balance was still due on account of the original subscription, was transferred to a third person merely to secure a loan, and, on payment of the loan, was re-transferred, such third person will not be liable

to creditors of the company for any balance due on the shares, where the transfer, though an absolute one on its face, was not signed and accepted so as to preclude him from showing that it was intended only as a security.

Mandion v. Firemen's Insurance Company of New Orleans, 178.

4. The property of a debtor being the common pledge of his creditors, every act done by him with intent to deprive them of their eventual rights upon it, is illegal. C. C. 1963, 1964. *Barker v. Phillips*, 190.
5. The creditors of one who had commenced an action against a succession, claiming to have been the husband of the deceased, and to be entitled, as such, to one half of the property in her possession at the time of her death as community property, may intervene and prosecute the claim, where they apprehend that the plaintiff is about to abandon it for the purpose of defrauding them. C. C. 1985. *Succession of Baum*, 314.
6. Plaintiff having commenced an action against a succession to cause himself to be acknowledged as the husband of the deceased, neglected for more than three years to take any steps in it, when certain creditors intervened, praying to be allowed to prosecute the action on the ground that the plaintiff was about to abandon it for the purpose of defrauding them. The latter subsequently attempted to discontinue, but his motion was overruled. *Held*, that the prescription of one year established by art. 1989 of the Civil Code is inapplicable to the claim of the intervenors, who do not seek to revoke any contract or act of any kind, but simply to intervene in an action for the protection of their rights. *Ib.*
7. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson v. Mylne*, 349.
8. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, in *solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball v. Hodge*, 390.
9. Where one sues for the possession of a house, built on his land for him by defendant, which the latter refuses to surrender, or for the value of the property, with damages for its detention, judgment should not be rendered condemning defendant absolutely to pay the value of the house, thereby rendering him the owner of the building. The judgment should be in favor of plaintiff for the possession of the house, with damages for its detention.
Bateman v. Dazy, 484.
10. Defendant promised, in writing, to pay to plaintiff, on a day fixed, a certain sum, in molasses at the market price. It was proved that, a few weeks before the time of payment, defendant wrote to plaintiff, requesting him to send, as soon as possible, casks in which to receive the molasses, as defendant apprehended that the cistern which contained his molasses would burst. Plaintiff did not send for the molasses, and, a few days after the debt was payable, defendant's

cistern bursted, and the molasses was lost. In an action against defendant for the amount so promised: *Held*, that admitting plaintiff was bound to furnish the casks, a mere notice to send them, without specifying any time at which the delivery was proposed to be made, is not a sufficient tender to place the molasses at his risk. Judgment for plaintiff for the amount claimed, payable in molasses, at the market price, at the time of payment. *Smith v. Richardson*, 516.

CORONER.

The office of Coroner is held for a term of four years. Act 1 March, 1827, s. 1. *Cruzat v. Davis*, 264.

COSTS.

1. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163. *Barkley v. His Creditors*, 28.
2. The costs of the proceedings, incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Ib.*
3. Security for the costs of the clerk of the Supreme Court is not required by any law, but by a rule of court. Under this rule the clerk may refuse to receive the transcript, unless security be given. But if received, without objection on account of want of security, he cannot afterwards consider the transcript as not filed, at least until the appellant has been put in default, by a demand of security. *Rivarde v. Palfrey*, 282.

See COURTS, 11.

COURTS.

- I. *Courts generally.*
- II. *Supreme Court.*
- III. *District and Probate Courts.*
- IV. *Commercial Court of New Orleans.*
- V. *City Court of New Orleans.*

I. *Courts generally.*

1. The law designates who the original sequestrator shall be, and the court cannot appoint another, unless by consent of parties. The parties to an action may select their own agents, and confer on them such powers as they think proper; but the court can impose no burdens or restrictions on such agents, not imposed by their principals. *United States v. Bank of United States*, 418.

II. *Supreme Court.*

2. The jurisdiction of the Supreme Court being appellate only, and limited by the Constitution (art. 4, § 2) to civil cases in which the matter in dispute exceeds three hundred dollars, it cannot issue a *mandamus* to an inferior tribunal where the amount in dispute is under that sum. A *mandamus* can be issued by the Supreme Court only in aid of its appellate jurisdiction. C. P. 829, 839. *State v. Parish Judge of Plaquemines*, 285.

3. A single decision, particularly where the point in controversy does not appear to have been thoroughly investigated, is insufficient to settle the jurisprudence of the country. *Lagrange v. Barré*, 302.

III. District and Probate Courts.

4. The provision of the Code of 1808 (book 3, title 1, art. 59), that the place where the party died is that in which his succession shall be considered to be opened, having been repealed by the Code of 1825, which declares (art. 929) that the succession shall be considered as opened in the parish in which the deceased resided, if he had a fixed domicile within the State: *Held*, that the death of the party must be considered as irrevocably vesting the jurisdiction, and that, if the death occurred while the old law was yet in force, the jurisdiction must be determined by it, though no proceedings were had before the promulgation of the new law; but that where a parish has been divided since the death, the jurisdiction will depend upon the fact of the court of the original parish having taken any steps, or assumed jurisdiction in relation to the *mortuaria*, before the division; if it has, its jurisdiction will not be divested by the division; otherwise jurisdiction will belong, under art. 929 of the Civil Code, to the court of the parish which embraces the residence of the deceased.

Beale v. Walden, 67.

5. The plaintiff in an action before a District Court assigned his claim therein to several creditors, notifying the defendants; other of his creditors, having obtained judgments against him, levied their executions, in the hands of the defendants, on his interest in the suit. Defendant having died pending the suit, his executors took a rule in the District Court on the assignees and seizing creditors to determine their respective ranks, and for the purpose of distributing among them the amount of the judgment which had been rendered in favor of the plaintiff, which they deposited with the clerk of the District Court: *Held*, that the amount so deposited is a debt in money due by the succession of the defendant to the assignees or seizing creditors; that the Probate Court, in which the succession of the defendant was opened, has exclusive jurisdiction to determine their rights and privileges on the sums due by the estate of the deceased (C. P. 924 § 13, 983); and that the assignees or seizing creditors, though they may have submitted below to the jurisdiction of the District Court, may demand, on appeal, the nullity of the judgment of the latter, on the ground of want of jurisdiction. C. P. 606 § 3, 608. The consent of parties cannot give jurisdiction, when wanting *ratione materiae*. It can only confer it, where mere personal rights are involved; or where a defendant is sued before another judge than the one of his domicile, and he nevertheless pleads to the merits. C. P. 93. *Fleming v. Hiligsberg*, 77.
6. District Courts have jurisdiction of an action to annul the legacies in a will, instituted by persons claiming to be heirs of the deceased, against the legatees in possession. *Dunn v. Kenney*, 249.
7. A District Court has jurisdiction of an action by the executor of a deceased partner against the survivor, for a settlement of the partnership accounts. *Thomson v. Mylne*, 349.
8. The jurisdiction of District Courts extends to the liquidation of claims against

successions when pleaded in compensation or reconvention, so far as the conflicting claims extinguish each other; but for any balance ascertained to be due to the defendant he must resort to the court in which the succession was opened, that his rank may be ascertained contradictorily with the other creditors, and his claim placed in its proper place on the *tableau* of distribution. *Ib.*

IV. Commercial Court of New Orleans.

9. An action before the Commercial Court to annul a sale made by the sheriff of a District Court, and exception that the former court cannot annul, or set aside the proceedings of the latter: *Held*, that so far as the judicial proceedings of the latter are concerned, the Commercial Court is without jurisdiction; but but where the executory proceedings of a sheriff are set up by defendants as the basis of their title, they may be examined, and set aside if illegal.

Mississippi Marine and Fire Insurance Company v. Bank of Louisiana, 47.

10. The Commercial Court of New Orleans has no jurisdiction of proceedings to cancel the license of an attorney at law. *Chevalon v. Schmidt*, 91.
11. The Commercial Court of New Orleans has no jurisdiction of petitory or possessory actions. Act of 14 March, 1839, s. 3. But where an exception to its jurisdiction on that ground, has been improperly overruled below, the Supreme Court will examine and decide the case on its merits, under the fourth section of the act of 14 March, 1839, which declares that "no judgment rendered in the Commercial Court shall be void for want of jurisdiction, but in case it be determined that the court had not jurisdiction of the case, the court to which the appeal is taken shall condemn the plaintiff to pay all costs in the court of the first instance, though a judgment may be rendered in the Supreme Court in his favor." *Second Municipality of New Orleans v. Garland*, 387.

V. City Court of New Orleans.

12. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. Judge of City Court of New Orleans, 394.

DISCONTINUANCE.

13. Where the rights of a plaintiff in an action against a succession have been seized under a *fi. fa.*, he cannot discontinue. *Succession of Baum*, 314.

See PRESCRIPTION 5.

DONATIONS INTER VIVOS.

1. A condition inserted in an act of donation *inter vivos* of all the donor's property, that the donee shall, without charge, supply the donor during his life with clothes and food, and, in case of sickness, with medical attendance, and shall bestow on him all the care which children would bestow on a parent,

cannot be considered as a reservation of enough of the donor's property for his subsistence, within the meaning of art. 1484 of the Civil Code. Such a donation is null for the whole. *Per Curiam*: The donor must keep in his own possession and ownership enough of his property for his subsistence. The mere promise of the donee to support the donor is insufficient. C. C. 1520, 1547. *Lagrange v. Barré*, 302.

2. Where the value of the object given exceeds by one-half that of the charges, or services, imposed on the donee, the donation be considered as an onerous one, to which, under art. 1513 of the Civil Code, the rules peculiar to donations *inter vivos* do not apply. *Ib.*
3. Excessive or inofficious donations—actions for the reduction of which are prescribed by five years, where the person entitled to exercise them is in the State, and by ten years if out of it, under art. 3507 of the Civil Code, are those dispositions which fathers and mothers, or other ascendants, make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law. C. C. 3522, s. 21. *Ib.*
4. An action to annul a donation *inter vivos*, in consequence of the donor's not having reserved property enough for his subsistence, is not prescribed by five years. From considerations of public order, such a donation is declared, by art. 1484 of the Civil Code, to be absolutely null. *Ib.*
5. A donation of a slave made to a concubine, was not illegal under the Code of 1808. Book 3, tit. 2, art. 10. *Sandoz v. Gary*, 529.

ERROR.

1. Plaintiff having purchased a slave from a third person, transferred to the latter in payment of the price part of a twelve-month's bond. In taking out execution on the bond, plaintiff's attorney, by mistake, ordered the clerk to credit the execution with the amount of the part of the bond so transferred. The balance due on the bond having been collected by the sheriff, the transferee claimed to be paid the amount transferred to him out of the sum in the hands of the sheriff, in preference to the plaintiff: *Held*, that the transferee cannot be prejudiced by the mistake of the plaintiff's attorney, and is entitled to the amount claimed. *Garrett v. Morgan*, 447.
2. Money paid through error, the debt having been previously satisfied, may be recovered back. C. C. 2129, 2280. *Beasley v. Allen*, 502.

EVIDENCE.

- I. *Onus Probandi.*
- II. *Presumption.*
- III. *Interest of Witness.*
- IV. *Examination of Witness.*
- V. *Commission to take Testimony.*
- VI. *Admissibility and Sufficiency of Evidence under the Pleadings.*
- VII. *Judicial Records and Proceedings, and Copies thereof.*

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1. Damages cannot be recovered for the temporary detention of a note, where the only evidence that plaintiff sustained any damage, is the testimony of two witnesses, who swear that, in their opinion, she sustained damage to a certain amount, and neither states any fact upon which his opinion is based.

Liles v. New Orleans Canal and Banking Company, 92.

2. Action by a collector of the customs at New Orleans who had been removed, to recover from his successor one half of the commission of one per cent allowed to the collector on the amount of certain bonds for duties on imports, the bonds having been taken by the plaintiff, but their amounts paid to his successor, to whom the whole commission was allowed on settlement of his accounts with the treasury: *Held*, that the act of Congress of 7 May, 1822, sec. 9, having declared that whenever the emoluments of the collector of the customs at New Orleans, and certain other ports, shall exceed a fixed sum, after deducting the expenses of the office, the excess shall be paid into the treasury, plaintiff must show that he has not received the *maximum* allowed by law, before he can maintain an action. *Prieur v. Morgan, 292.*

3. Payments to the creditors of a succession, made without an order from the Court of Probates, are irregular; but when they exonerate the estate from legal charges, and thereby benefit the heirs, the latter must show that such charges are unjust, unfounded, or excessive, or the payments will be allowed to the party by whom they were made. *Rouly v. Bérard, 478.*

See 32, 41, *infra*.II. *Presumption.*

4. All the effects or property in the possession of the spouses, or either, at the time of the dissolution of the community by death, are presumed to belong to the community. C. C. 2374. *Succession of Baum, 314.*
5. Where one claiming under a *fi. fa.* produces the judgment, execution, sheriff's

return thereon, and act of sale, it will be presumed that the formalities of the law have been complied with. It is for the other party to show that they have not been complied with. *Succession of Baum*, 314.

6. Persons of color are presumed to be free. *Per Curiam*: Slavery is an exception to the condition of the great mass of mankind, and, except as to Africans in the slaveholding States, the presumption is in favor of freedom, and the burden proof is on him who claims the colored person as a slave.

Miller v. Belmonti, 339.

7. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson v. Mylne*, 349.

8. Action to recover certain slaves purchased by defendant from a third person, in whose possession they were at the time of the sale. It was proved that they had been brought into this State by the vendor as the administrator of the succession of plaintiff's ancestor, and had remained in his possession several years; that they had been seized under execution as the property of the vendor, and offered for sale, but were not sold, in consequence of the general notoriety of the fact, that they were not the property of the party in whose hands they were seized; and that defendant was present when they were offered for sale, probably with a view to bid for them: *Held*, that the facts warrant the presumption that the defendant was aware of the defect in the title of his vendor. Judgment for the plaintiffs. *Jenkins v. Theriot*, 450.

See 40 *infra*.

III. Interest of Witness.

9. A witness holding other property under a title through which the party offering him claims the property in litigation, has an interest in the question rather than in the case; and any objection on that account goes to his credit, and not to his competency. *Prevost v. Ellis*, 56.
10. Where, in case of a judgment against defendants, one offered as a witness will be liable to the latter for the debt and costs, but, in case of a judgment in their favor, will be bound for the debt alone, he is incompetent. An interest in the costs renders a witness incompetent. *Montross v. Hillman*, 87.
11. To render one of the original parties to a policy of insurance, alleged to have assigned all his interest therein for the benefit of his creditors, competent as a witness for the other insurers in an action on the policy, the acceptance of the assignment by all the creditors must be proved, where the assignment, stipulating the release of the debtor, is not so manifestly for their benefit, that their acceptance can be presumed. Nor will such a witness be rendered competent by the execution, in open court, of an instrument abandoning all his interest in the policy for the benefit of his creditors. *Per Curiam*: He is still interested that the creditors who have not released him should receive a part of the amount sued for; and he cannot release himself.

Wellington v. Merchants' Insurance Company, 222.

IV. *Examination of Witness.*

12. Where a number of interrogatories have been propounded to different witnesses, an exception that they "contain leading questions," without further specification, will be disregarded, as too general. *Ib.*

V. *Commission to take Testimony.*

13. Where a party notified by his adversary to attend at a certain hour at a commissioner's office, for the purpose of taking the deposition of a witness, attends at the appointed hour, waits for half an hour without the commissioner's appearing, and leaves, and, after his departure, the commissioner arrives, and proceeds to take the deposition, it will be inadmissible on the trial.

Clark v. Hartwell, 201.

14. Notice of the time and place of taking the deposition of a witness about leaving the State, left at the office of attorney of record, during the absence of the latter from the State, with a white person over fourteen years of age, is sufficient. *Lindley v. Hagens*, 203.

15. Where a commission to take testimony is addressed to a resident of another State by name, as a special commissioner, he becomes an officer of the court for that purpose, and no proof is required of his qualifications to discharge the duties imposed on him. *Succession of Baum*, 314.

16. Where the facts intended to be proved under a commission, taken out by parties who intervened for the purpose of prosecuting the suit for their own benefit, as creditors of the plaintiff, on an allegation that he was about to abandon it, go to support the allegations of the petition, the plaintiff cannot exclude the evidence, on the ground that he had no opportunity to cross-examine the witnesses. *Ib.*

17. Commissioners to take depositions in other States or Territories of the Union, appointed by the Governor under the act of 10 March, 1838, are state officers, and the courts are bound to recognise their official signatures and seals.

Dwight v. Splane, 487.

18. One to whom a commission to take testimony is directed is not required to reduce the testimony to writing himself. It is sufficient, when not taken down by the witness, that it be written by any disinterested person. *Ib.*

19. The fact that the blanks in a printed commission to take testimony were filled up by an attorney of one of the parties, is immaterial, where the commission was signed by the clerk of the court from which it was issued, and sealed with his official seal. *Ib.*

20. A commission to take testimony within the State, may be directed, generally, to any judge, or justice of the peace, in a particular parish. *Ib.*

21. Where a witness examined under a commission neglects to answer a cross-interrogatory, but in answering the last direct interrogatory states facts not called for by it, but which are a complete answer to the cross interrogatory, the statement will be presumed to have been intended as an answer to the latter, and the evidence will be admitted. *Ib.*

See 12, *supra*.

VI. *Admissibility and Sufficiency of Evidence under the Pleadings.*

22. Action to recover an amount due for drayage, and defence that the price

claimed exceeded the value of the services. Plaintiff having proved by a witness that defendant had agreed to pay a certain price therefor, the latter offered to introduce evidence to show that the usual price was less. *Held*, that the evidence was admissible, defendant having a right to introduce evidence to contradict plaintiff's witness, or to establish a different price.

McGawley v. Gannon, 164.

23. Where a married woman, sued on her note, secured by mortgage, given for the repayment of money counted and delivered to her in the presence of the notary's clerk, adduces evidence which shows that the transaction was a disguised advance to her husband, she will be bound, if it be shown that she subsequently converted the fund to her own use, under false pretences, to the prejudice of the creditors of her husband. *Alling v. Egan*, 244.
24. Plaintiff having purchased two lots of ground described in the act of sale as "formant islets," and situated in a certain division marked on a plan deposited in the notary's office, sued the occupier of a contiguous lot to cause a street to be opened. No street was mentioned in the act of sale to plaintiff, nor was any parol evidence offered to prove the existence of one at the time of the sale. An old plan was produced as being the one referred to in the sale, on which the street was marked; but there was no proof that it was marked thereon at the time of the sale, while there was evidence, on the face of the plan itself, showing that other streets describes on it, had been marked at a subsequent period. *Held*, that the evidence was insufficient to prove the dedication of a street, of which no mention was made in the sale.

Guillotte v. Toby, 294.

VII. *Judicial Records and Proceedings, and Copies thereof.*

25. An extract certified by the clerk from the minutes of the court, showing that a judgment had been rendered in a suit, though the minutes were signed by the judge, is not the best evidence of the judgment, as the law requires a judgment to be given and signed in every case; and it is to be presumed that one exists until the contrary is shown. The extracts from the minutes would be admissible to prove a judgment rendered in 1814, on proof that no judgment could be found in the record, and that no other than that entered on the minutes appeared to have ever existed, or that it had been lost. *Choppin v. Michel*, 233.
26. Copies of judgments of the Supreme Court, certified by the clerk, are sufficiently proved. *Ib.*
27. A final judgment rendered in another State between the same parties, where both were before the court, will be conclusive between them, on an application to render the judgment executory here. The plaintiff cannot be called upon again for proof of his demand.

Hazard v. Agricultural Bank of Mississippi, 326.

28. To prove the reversal by the Supreme Court of the United States of a judgment obtained in a Circuit Court, defendants offered in evidence a printed copy of the record of the suit in the Supreme Court certified by the clerk of the Circuit Court, under the seal of his court, to be a true copy of the record and the proceedings of the Circuit Court in the action; and a copy of the mandate of the Supreme Court, reversing the judgment below, and remanding the case for further proceedings, also certified, by the clerk of the Circuit Court, under

the seal of his court, to be a true copy of the original on file in his office. There was no copy of the judgment of the Supreme Court among the papers offered in evidence. On an exception to the evidence: *Held*, that it was inadmissible, there being no proof that the person who signed as clerk of the Circuit Court was clerk of that court, and the record not being authenticated as required by the act of Congress of 26 May, 1790.

United States v. Bank of the United States, 418.

29. The courts of this State are not bound to know the clerks of the courts of the United States in other States; nor will any greater weight or authority be given to their certificates and official acts, than to those of the clerks of the state courts of such States. *Ib.*
30. The associate judges of the City Court of New Orleans, as well as justices of the peace, being officers of the State, their signatures and official seals prove themselves. *Dwight v. Splane*, 487.

VIII. Non-judicial Records, and Copies thereof.

31. An act of sale of lands, passed in 1774 before a Spanish commandant in Louisiana, in the presence of two witnesses, which recites that the vendor did not sign it because he could not write, and that the title was delivered to the vendee who took immediate possession, and which had remained among the notarial records of the parish, is admissible in evidence to prove a title to the property. *Per Curiam*: The act would have been sufficient evidence of title under the Spanish law, which permitted parol sales of immovables; it has all the requisites of an authentic act; and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it, the ordinary mark of a party to an authentic act not being required at that period.

Choppin v. Michel, 233.

32. The signatures of the Spanish governors, and other known officers of the former provincial governments of Louisiana, prove themselves. Where any question is raised as to the authenticity of such signatures, or the authority of the officer, the burden of proving the fraud or want of authority, devolves on the party alleging such fraud or want of authority. *Choppin v. Michel*, 233.
33. An act of the legislature of Pennsylvania, of 5 March, 1842, provides that any assignment of property, made by a bank in pursuance of that act, must be approved by the Court of Common Pleas of the county in which the bank is situated, and be recorded in the office of the Recorder of Deeds for the same county; and an act of 14 April, 1834, authorizes the prothonotaries of the courts of Common Pleas to sign the judgments of those tribunals. Plaintiffs offered in evidence a copy certified by the Recorder of Deeds to be a true copy from the records of his office, of an assignment made by a bank under the act of 1842, and of a certificate annexed to it signed by the prothonotary of the Court of Common Pleas, and sealed with its seal, reciting that the court had approved of the assignment. Appended were certificates from the presiding judge of the Court of Common Pleas attesting the signature and official capacity of the Recorder of Deeds, and from the prothonotary of the court attesting the signature and official capacity of the presiding judge. Defendants excepted to the evidence, alleging in their bill that the assignment could

only be proved by producing the original, or, on showing that it could not be had, a copy compared therewith; that the act of Congress respecting the authentication of non-judicial records, was inapplicable to the case; and, if applicable, had not been complied with. The bill did not state in what the act had not been complied with. *Held*, that the act of Congress applies to such a case; that so general an objection as that the law has not been complied with, is insufficient in a bill of exceptions; and that such generality cannot be corrected by specifications after appeal. *Horn v. Bayard*, 259.

IX. *Inadmissibility of Parol Evidence under art. 2256 of the Civil Code.*

34. Parol evidence is inadmissible to prove that a slave sold by defendant to plaintiff, was represented as possessing certain qualifications not mentioned in the act of sale. *Milliken v. Andrews*, 241.
35. Parol evidence is inadmissible to alter, modify, or contradict a written act of transfer of immovables or slaves, or to prove any agreement or stipulation beyond its contents, where there is no allegation of fraud, error or violence. C. C. 2256. But such evidence is admissible to prove that the adjudication price of real estate sold at auction, was paid to a creditor holding a mortgage on the property, and the manner of such payment. *Macarty v. Gasquet*, 270.
36. Action by a wife for a separation of property, claiming a slave as paraphernal, and opposition by the creditors of the community. Plaintiff offered in evidence a notarial act of sale of the slave, in which the vendor acknowledged the receipt of a sum of money from the plaintiff, as the price. Plaintiff then offered parol evidence to prove that the transaction was in fact a *dation en payement*, and that the slave was given to plaintiff by her mother, as an advance upon her inheritance: *Held*, that the evidence was admissible to prove that the slave was acquired by the funds of the wife, and that, in this respect, it does not contradict the notarial act. *Gonor v. Her Husband*, 526.

X. *Admissibility of Parol Evidence to establish Date of an act Sous Seing Privé.*

37. As a general rule, an act under private signature has no date as to third persons; but a date may be given to it by facts *dehors* the act, as by proof of the death of the person in whose hand-writing it is shown to have been drawn up, or of a subscribing witness. *Prevost v. Ellis*, 56.
38. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé*, was signed and executed on the day of its date, is insufficient to give it effect from its date as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*

XI. *Proof of Fraud.*

39. The provision of art. 2256 that parol evidence shall not be admitted against or beyond the contents of written acts of transfer of immovables, was designed for the protection of contracting parties against each other. It does not apply where a partner claims from his co-partner a sum of money, alleged to have been privately and fraudulently received by him from a purchaser of partnership property as a part of the price, and offers the purchaser as a witness to

prove the payment of the money, though not mentioned in the notarial act of sale signed by both partners and the purchaser. The testimony of the purchaser is admissible. *Succession of Tilghman*, 124.

40. Fraud will not be presumed. It cannot, generally, be proved by direct and positive evidence; but the circumstances going to establish it must be strong, consistent, and calculated to induce the belief that a fraudulent intent existed.

Follain v. Dupré, 454.

41. To annul a sale on the ground of fraud, the creditor must prove the inability of the debtor to pay his debts, and injury to himself. *Per Curiam*: A contract, though made in bad faith, cannot be rescinded by creditors unless it operate to their injury. C. C. 1973. *Lasfleur v. Hardy*, 493.

XII. Proof of Marriage.

42. The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties afterwards lived together as man and wife, is sufficient legal evidence of a marriage; and the testimony of a witness who swore that he was a justice of the peace in another State, and celebrated the marriage, is sufficient proof of the fact that the witness was a justice.

Dunn v. Kenney, 249.

XIII. Secondary Evidence.

43. Action to recover of defendant the value of certain carriages, consigned by plaintiff to a third person for sale, and sold under a *fi. fa.* by defendant, and purchased by him as the property of one of his debtors. The consignee, who resided in another State, having since died, plaintiff offered the clerk of the consignee as a witness. On an objection to his testimony, on the ground that his only knowledge of the matters in controversy, being derived from a correspondence between the plaintiff and consignee, not produced nor accounted for, was not the best evidence: *Held*, that his testimony was admissible, and that plaintiff cannot be supposed to have the means of procuring the books and papers of the deceased, nor the letters written to him. *Hyde v. Hepp*, 159.
44. Testimony of witnesses taken in a suit between other parties, offered to prove possession by persons long since dead, is inadmissible, where the affidavit made for the purpose of laying a foundation for its admission does not state that the witnesses are dead, nor what other efforts have been made to procure other evidence of the fact. *Choppin v. Michel*, 233.
45. One who has loaned money to an insolvent, before his surrender, for the purpose of satisfying a judgment obtained against him, should prove the loan and subrogation and the receipt of the money by the judgment creditor, by a notarial act. C. C. 2156 § 2. But where the loan and subrogation were proved by authentic act, and parol evidence was admitted in the lower court, without objection, to establish the payment to the creditor, it will be too late to object to the nature of the proof of payment, after appeal.

Wilcox v. His Creditors, 346.

46. Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost or destroyed. *Rouly v. Bérard*, 478.

See 58, *infra*.

XIV. *Irrelevant Evidence.*

47. Letters written by a third person to an agent are inadmissible in evidence against the principal. *Garrett v. Morgan*, 447.
48. Evidence, though improperly admitted, will be disregarded, where it could not have operated to the disadvantage of the party who objected to it.

Rouly v. Bérard, 478.

XV. *Evidence of Particular Persons.*1. *Parties.*

49. Where, in an action for the settlement of partnership accounts, the defendant, in whose hands the books, accounts, and evidences of debts due to the firm remained at the time of its dissolution, is proved to have admitted that there were outstanding debts due to the partnership to a certain amount, and he states in his answer that he will file a list of them, but omits to do so, and shows no diligence in collecting them, judgment will be given against him for a sum equal to the plaintiff's share in the debts due to the partnership at the time of its dissolution. *Cazeau v. Faget*, 10.
50. Where, in answer to an interrogatory, a party states facts not necessarily connected with that as to which he was interrogated, such irrelevant matter will be struck out, on motion. *Smith v. Richardson*, 516.

2. *Notaries.*

51. A notary cannot testify to any thing that will contradict or strengthen his official acts. *Follain v. Dupré*, 454.
52. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

3. *Persons Indebted to, or Possessing Property of Defendant.*

53. The right given by the 13th section of the act of 20 March, 1839, to a plaintiff who has applied for a writ of *fi. fa.*, to propound interrogatories to a third person believed to have property or effects under his control belonging to defendant, or to be indebted to him, can only be exercised so long as the writ remains in the hands of the sheriff. *Raboteau v. Valetton*, 218.

XVI. *Evidence in Particular Actions.*1. *In Actions on Bills of Exchange and Promissory Notes.*

54. In an action against the endorser of a note, the signature of the maker need not be proved. *Young v. Patterson*, 7.
55. In an action against the endorser of a note, the notary who had protested it, certified, that he had left notices of the protest at the counting-house of defendant, in a letter addressed to him, handed to a clerk of competent age, there employed. A witness introduced by defendant swore, that he was the only clerk of the latter at the maturity of the note, and that he never received any notice of protest. *Per Curiam*: This does not destroy the effect of the notary's certificate. The notice was enclosed in a letter, which it must be presumed was sealed, and the witness thus prevented from knowing its contents.

Ib.

56. The evidence of a witness who states, that he verily believes that notice of the neglect or refusal of the acceptor to pay a bill at maturity was given to the drawer, but does not say how it was given, nor assign any reason for his belief, nor state any fact from which the court may judge of the sufficiency of the notice, is not sufficient proof of notice.

Kræuller v. Bank of United States, 213.

57. An endorsement of a partial payment, in the hand writing of the holder of the note, without other proof that a payment was made at the date mentioned in the endorsement, is insufficient to interrupt prescription.

Splane v. Daniel, 449.

58. Where a plaintiff relies on the protest and certificate of a notary, under the act of 13 March, 1827, to prove a demand of payment and notice of protest, parol evidence is inadmissible to explain, contradict, or add to the written evidence; nor can a portion of such evidence be used to make out one part of the case, and the testimony of the notary, as to any thing required by law to be inserted in such acts, to make out another part. As to any other facts, the notary is competent. But a plaintiff may offer the protest and certificate in evidence, and the parol testimony of the notary to prove a demand and notice, with the view, in case the protest and certificate should be insufficient under the statute, to rely on the parol evidence alone. If the protest and certificate be imperfect and insufficient under the statute, they are not the best evidence, and, consequently, parol testimony cannot be excluded as secondary.

Follain v. Dupré, 454.

59. The acts of 14] March, 1823, and 13 March, 1827, authorising notaries, parish judges, and, in some cases, justices of the peace, to protest and give notice of the protest of bills and notes, have introduced no new rule as to demand of payment, or the diligence to be used in giving notice of protest. They merely introduced a new mode of proof, unknown to the commercial law. *Ib.*

60. A protest by a notary of a domestic bill or promissory note for non-acceptance or non-payment, and his certificate of notice to the endorser, are inadmissible under the general commercial law. They are only received where there is a statute or local law authorising their admission. By the act of the legislature of this State, of 13 March, 1827, a notary is authorised to do what the holder of the bill or note is required, under the commercial law, to do himself, and to certify the facts officially; but the mode of proof authorised by the statute is not exclusive. *Ib.*

61. Where the protest of a notary is offered in evidence to prove a demand of payment of the makers of a note, it must appear from the protest itself that the notary had the note in his possession, and demanded payment at the proper place and from the proper party. The answer of the party of whom the demand was made, must also appear in the protest. *Dupré v. Richard*, 495.

62. Where, in an action against an accommodation endorser, the plaintiff has had a fair opportunity for making out his case, and has failed, the court will not render a judgment as in case of non-suit, on the mere suggestion that the notary, who was not examined as a witness, might, on another trial, testify to facts that would entitle the plaintiff to recover. *Ib.*

2. *In Petitory Actions.*

63. To make out a title by prescription, such as will authorise a recovery in a petitory action, where possession has been decreed to be in the other party, plaintiffs must, at least, show clearly that, before possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession, a sufficient length of time, under a just title, with proof of the exact commencement of that possession. C. C. 3452, 3453.
Prevost v. Ellis, 56.
64. The plaintiff in a petitory action can recover only on the strength of his own title. *Sandoz v. Gary*, 529.

EXCEPTIONS, BILL OF.

1. So general an objection as that the law has not been complied with, is insufficient in a bill of exceptions; and such generality cannot be corrected by specifications after appeal. *Horn v. Bayard*, 259.
2. Where a number of interrogatories have been propounded to different witnesses, an exception that they "contain leading questions," without further specification, will be disregarded, as too general. *Follain v. Dupré*, 454.

EXECUTION OF JUDGMENTS.

1. Where the notice of seizure under a *fi. fa.* is illegal, the sale will be set aside. *Mississippi Marine and Fire Insurance Company v. Bank of Louisiana*, 47.
2. Where, after a seizure under a *fi. fa.*, the sheriff is enjoined from further proceedings, he should not return the writ into court, but retain it to be proceeded with in case the restraining order be withdrawn or annulled. Where a seizure has been made under a *fi. fa.* before the return day, the sheriff should retain the writ until the property is sold, or he is ordered by the plaintiff, or other competent authority, to release it. Where the seizure has been made before the return day, he may do all that the law requires of him, after that time. *Cochrane v. Bank of the United States*, 64.
3. Where, after a seizure under a *fi. fa.*, the sheriff, on being enjoined from further proceedings, returns the writ into court, and under an *alias fi. fa.* proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled. *Ib.*
4. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, nor attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Bank of Tennessee v. McKeage*, 130.
5. The mere seizure under a *fi. fa.* of a judgment in favor of a debtor, does not divest the property of the latter, and transfer it to the seizing creditor. It gives him at most a right to proceed and sell the judgment, and to be paid by

preference out of the proceeds.¹ A *fi. fa.* is the warrant of the sheriff, authorising him to seize property and keep it, and to sell it to satisfy the judgment under which it was issued. When a seizure has been made, the sheriff is not bound to return the writ, though it have subsequently expired. He may retain it, and sell the property seized. If he returns the writ, he will be without authority to hold, or dispose of the property; and any privilege resulting from the seizure will cease to exist.

Sheldon v. New Orleans Canal and Banking Company, 181.

6. Where the proceeds of property seized and sold under a *fi. fa.* are claimed in virtue of a previous seizure under a *fi. fa.*, the claimant must oppose, by way of third opposition, the application of the proceeds to the satisfaction of the second execution. C. P. 396, 397, 401, 402. *Ib.*
7. A sheriff or marshal is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau v. Valetton*, 218.
8. The right given by the 13th section of the act of 20 March, 1839, to a plaintiff who has applied for a writ of *fi. fa.*, to propound interrogatories to a third person believed to have property or effects under his control belonging to the defendant, or to be indebted to him, can only be exercised so long as the writ remains in the hands of the sheriff. *Ib.*
9. A sale of the contents of a coffee-house or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas v. Lanata*, 288.
10. Where the rights of a plaintiff in an action against a succession have been seized under a *fi. fa.*, he cannot discontinue. *Succession of Baum*, 314.
11. The seizure under a *fi. fa.* of the interest of a debtor in notes, entitles the seizing creditor to be paid by preference out of the proceeds.
Lafleur v. Hardy, 493.

EXECUTOR.

See SUCCESSIONS.

FAMILY MEETING.

See MINOR 2.

FIERI FACIAS.

See EXECUTION OF JUDGMENTS.

FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

The appellants, stockholders in the Firemen's Insurance Company of New Orleans, having paid only the first instalment of five per cent on each share, the directors declared the stock forfeited. Plaintiff having obtained judgment against the company, sued out a *fi. fa.*, under which interrogatories were propounded to the appellants; and, on a rule taken on them to show cause why

they should not be compelled to satisfy the execution to the extent of their unpaid subscriptions: *Held*, that under the act of 10 March, 1838, incorporating the company, the directors had no right to declare the stock forfeited after the payment of only five per cent, and that the appellants were bound to satisfy plaintiff's judgment to the extent of their unpaid subscriptions.

Dixon v. Firemen's Insurance Company, 252.

FRAUD.

1. Fraud will not be presumed. It cannot, generally, be proved by direct and positive evidence; but the circumstances going to establish it must be strong, consistent, and calculated to induce the belief that a fraudulent intent existed.

Follain v. Dupré, 454.

2. Fraud in obtaining an endorsement, is no defence to an action against the endorser, by one to whom the note had been transferred in the usual course of business, for a good consideration, without notice, unless fraud or collusion can be proved as to him. *Ib.*

GARNISHEE.

See ATTACHMENT 4.

GUARANTEE.

See SURETY 1.

HUSBAND AND WIFE.

1. A wife having obtained a judgment of separation of property, levied a *f. fa.* on the property of the husband, who subsequently applied for the benefit of the bankrupt act of Congress, of 19 August, 1841, and was discharged. The wife's execution not having been satisfied in full: *Held*, that the balance of the debt due by the husband, was extinguished by his discharge.

Alling v. Egan, 244.

2. A creditor who seeks to enforce the payment of a note executed by a married woman, though separated in property from her husband, must prove that the consideration for which it was given, enured to her advantage. *Ib.*
3. Where a married woman, sued on her note, secured by mortgage, given for the repayment of money counted and delivered to her in the presence of the notary's clerk, adduces evidence which shows that the transaction was a disguised advance to her husband, she will be bound, if it be shown that she subsequently converted the fund to her own use, under false pretences, to the prejudice of the creditors of her husband. *Ib.*
4. The fact that a marriage was celebrated by a person acting as a justice of the peace, and that the parties afterwards lived together as man and wife, is sufficient legal evidence of a marriage; and the testimony of a witness who swore that he was a justice of the peace in another State, and celebrated the marriage, is sufficient proof of the fact that the witness was a justice.

Dunn v. Kenney, 249.

5. All the effects or property in the possession of the spouses, or either, at the

time of the dissolution of the community by death, are presumed to belong to the community. C. C. 2374. *Succession of Baum*, 314.

6. The heirs of a wife may renounce the community, for the purpose of exonerating themselves from the debts contracted during the marriage (C. C. 2379); but the husband, having been the head thereof, can never do so, either directly or indirectly. *Ib.*
7. Though the general rule established by the Civil Code is, that purchases made during the marriage, by either spouse, belong to the community, in whosoever name made, yet a wife may acquire separate property by the *bona fide* reinvestment of her paraphernal funds, of which her husband never had the administration, or by a *dation en payment* in consideration of a separate and paraphernal claim. *Broussard v. Her Husband*, 445.
8. A judgment in a suit for separation of property will not be conclusive against the wife's right to property, not mentioned as her separate property in the judgment of separation, in a contest with the creditors of the husband, especially with such as became so before the judgment was rendered. *Ib.*
9. A note executed by a married woman, without the authorisation of her husband or of the judge, for the fees of counsel employed by her to institute a suit against her husband for a separation of property, is not binding on her. C. C. 123, 127, 129, 1775, 1779. The order of the judge, authorising her to sue, cannot be considered as empowering her to contract with any one with reference to the suit. But where a suit for separation has been actually brought, the attorneys employed by her may sue, on a *quantum meruit*, for the value of their services. *Crow v. Yocom*, 506.
10. Under the Code of 1808, when a slave formed part of the paraphernal property of the wife, the issue of the slave was also paraphernal. Code of 1808, book 3, tit. 5, arts 50, 62; book 2, tit. 2, art. 4; book 2, tit. 3, art. 12. Under the Spanish laws, the issue belonged to the community of gains. *Gonor v. Her Husband*, 526.
11. The Spanish laws and the Codes of 1808 and 1825, agree in the general principle, that all property acquired by purchase during the marriage, whether in the name of the husband or wife, belongs to the community, (Febrero, part 2, book 1, ch. 4, §1, no. 6; Code of 1808, book 3, tit. 5, art. 64; C. C. 2371, 2374,) even where the purchase is made with the funds of the wife; but from this rule are excepted things received by either spouse, as a *dation en payment* of money due as a separate and individual right, or purchases made as a *bona fide* reinvestment of money under the wife's control, and forming part of her paraphernal property. Thus a *dation en payment* by a mother, made to the wife, as an advance upon her inheritance, is paraphernal. *Ib.*

INJUNCTION.

Where a defendant in an action commented by injunction, excepts to answering to the merits, on the ground that the oath taken and the bond given to obtain the injunction, were taken and executed by one claiming to act as the attorney in fact of the plaintiff, though no copy of the power was annexed to the petition, the power must be produced, or the action will be dismissed. C. C. 320. *Mayes v. Smith*, 503.

INSOLVENCY.

1. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with security, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplesis v. His Creditors*, 4.
2. The commission allowed to the provisional syndics of the creditors of an insolvent estate, by the 11th section of the act of 20th February, 1817, of "one per cent on the appraised value of the goods and effects confided to their care," is to be calculated on the appraised value of the property as shown by the schedule of the insolvent. *Barkley v. His Creditors*, 28.
3. A provisional syndic of an insolvent estate has no other duty to discharge than that of keeping the property surrendered as a deposit, performing such conservatory acts as may be necessary for the interest of the insolvent and his creditors, and demanding and receiving the rents and income of the property, and such debts as may become due during his administration, which expires on the nomination of definitive syndics. *Ib.*
4. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163. *Ib.*
5. The costs of the proceedings incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Ib.*
6. A cashier of a bank has no authority, by virtue of his office, to represent the bank at a meeting of the creditors of an insolvent, and to vote for a syndic. A resolution of the board of directors can alone empower him to do so. But a ratification by the directors of the acts of a cashier who had voted at a meeting of creditors without authority, made after the proceedings before the notary were closed, and the ten days had expired after which the rights of the parties claiming the syndicism became fixed, cannot affect rights previously acquired. C. C. 1789, 2252. Act 20 February, 1817. *Reed v. Powell*, 98.
7. A judgment discharging the future property of an insolvent, who had made a

cessio bonorum, from all proceedings for the recovery of debts previously contracted, though it may not have strictly conformed to the law under which it was rendered, will be conclusive against a creditor who was a party to the proceedings, and took no appeal therefrom within the time prescribed by law.

Gurlie v. Flood, 166.

8. One who was a creditor of an insolvent at the time of his surrender, cannot take out an execution against property subsequently acquired. Property acquired since the cession cannot be proceeded against by any of the creditors individually. It must be abandoned for the benefit of all the creditors, and those who have become such since the first cession must be paid in preference to the others. C. C. 2173. *Ib.*
9. The property of a debtor being the common pledge of his creditors, every act done by him with intent to deprive them of their eventual rights upon it, is illegal. C. C. 1963, 1964. *Barker v. Phillips*, 190.
10. Where one purchases property from an absconding debtor, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, it will be annulled. C. C. 1973. But the purchaser, though in bad faith, will be entitled to a restitution of so much of the consideration or price paid by him, as he shall prove to have enured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. C. C. 1977. *Ib.*
11. A syndic of the creditors of an insolvent, though himself an attorney and counsellor at law, may procure the assistance of counsel in cases in which he needs it. He is a judge of the necessity; and where the value of the services is proved, and it is not shown that such assistance was improperly sought, the fees of the counsel must be paid out of the estate surrendered. *Wilcox v. His Creditors*, 346.
12. Prescription is interrupted by a *cessio bonorum* made by the debtor. *Ib.*

INSURANCE.

1. To render one of the original parties to a policy of insurance, alleged to have assigned all his interest therein for the benefit of his creditors, competent as a witness for the other insurers in an action on the policy, the acceptance of the assignment by all the creditors must be proved, where the assignment, stipulating the release of the debtor, is not so manifestly for their benefit, that their acceptance can be presumed. Nor will such a witness be rendered competent by the execution, in open court, of an instrument abandoning all his interest in the policy for the benefit of his creditors. *Per Curiam*: He is still interested that the creditors who have not released him should receive a part of the amount sued for; and he cannot release himself. *Wellington v. Merchants' Insurance Company*, 222.
2. There can be no abandonment as for a total loss, in a case in which the damage is under fifty per cent of the value of the thing insured. *Riley v. Ocean Insurance Company*, 255.
3. Where the policy provides that the vessel insured is warranted free from average, unless general, under fifteen per cent, the limitation forms a part of the contract, and the insurers will not be liable unless the loss is proved to have exceeded that amount. *Ib.*

4. One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor; but such an assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferee before that date, and the policy remained in the possession of the assignor. C. C. 1804, 2612, 2613. *Succession of Risley*, 298.

INTERPRETATION.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 19.

JUDGMENT.

1. An action to recover the amount of a policy having been instituted against an insurance company, a short time before its dissolution by the expiration of its charter, an answer was filed by the attorney of the company a few days after its dissolution; he shortly afterwards resigned his appointment, and no further proceedings were had for several years. The charter of the company made each shareholder "liable, in his individual and private capacity, to the extent of his shares, in any suit or action pending at the time of the dissolution of the charter, or to be brought thereafter." A few days before the dissolution of the charter, the company transferred, for a certain sum, all its capital stock to another company, which guarantied the stockholders of the old company from all further responsibility as such. The action was tried, some years after, *ex parte*, in the absence of any representative of the company or its stockholders, and without notice to, and in the absence of, any one interested in the defence, and judgment rendered in favor of the plaintiff. In an action, by one of the stockholders of the dissolved company, to annul the judgment: *Held*, that the judgment was illegal and void; that the defendants, by the expiration of their charter, had lost all capacity to appear in court; that the plaintiff should have cited the stockholders, in case he intended to exercise his recourse against them under the charter, and have made them defendants, unless he chose to avail himself of the transfer of the stock, and to call the transferrees to defend the suit under the responsibility assumed by them; and that the plaintiff in the action of nullity, being still responsible for the debts of the dissolved corporation to the extent of the shares transferred by him to the new company, had a sufficient interest to authorise him to sue to annul the judgment. C. P. 606.
Musson v. Richardson, 37.
2. In annulling a judgment on the ground of the neglect of the plaintiff to make the proper parties, after the defendants, an incorporated company, had become, pending the suit, incapacitated to appear in court by the expiration of their charter, the Supreme Court will not declare the proceedings invalid only from the date of the dissolution, and reserve to the original plaintiff the right to make other parties and to proceed with his action. The judgment complained of being the only matter in controversy, if illegal, it will be simply annulled.
Ib. 43.
3. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of

the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Baldwin v. Carleton*, 109.

4. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*
5. The signature of the judge is required only to final judgments. C. P. 546. Other decrees, or orders, made in the course of a suit, may be entered on the minutes, and, where they may cause irreparable injury, may be appealed from, though not signed. C. P. 544. *Kraeuler v. Bank of United States*, 160.
6. A judgment discharging the future property of an insolvent, who had made a *cessio bonorum*, from all proceedings for the recovery of debts previously contracted, though it may not have strictly conformed to the law under which it was rendered, will be conclusive against a creditor who was a party to the proceedings, and took no appeal therefrom within the time prescribed by law. *Gurlie v. Flood*, 166.
7. Where a mortgage has been erased in pursuance of a judgment of a court of competent jurisdiction, rights acquired by subsequent mortgagees, before any proceedings to annul the judgment, will not be affected by any illegality in it. Third persons are not bound to look beyond the judgment, which, if rendered by a court of competent jurisdiction, must have its full effect, and can only be annulled by a direct action. *Aliter*, as to the parties themselves, or their *ayans-cause* with notice; as to them, the rights of a mortgagee cannot be affected by any order or decree in a case to which he was not a party. *Delavigne v. Guienne*, 171.
8. A single decision, particularly where the point in controversy does not appear to have been thoroughly investigated, is insufficient to settle the jurisprudence of the country. *Lagrange v. Barré*, 302.
9. A final judgment rendered in another State between the same parties, where both were before the court, will be conclusive between them, on an application to render the judgment executory here. The plaintiff cannot be called upon again for proof of his demand. *Hazard v. Agricultural Bank of Mississippi*, 326.
10. A judgment in a suit for separation of property will not be conclusive against the wife's right to property, not mentioned as her separate property in the judgment of separation, in a contest with the creditors of the husband, especially with such as became so before the judgment was rendered. *Broussard v. Her Husband*, 444.

JURY.

The license of an attorney at law cannot be withdrawn or annulled, unless on conviction in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicile of the accused; and there must be a trial by jury. Act 31 March, 1808, s. 6. 27 March, 1823, s. 3. 23 March, 1826, s. 1. *Chevalon v. Schmidt*, 91.

LAND, POWER TO GRANT, UNDER SPANISH GOVERNMENT.

By a royal order of the 22d October, 1798, the power to grant lands was taken from the Governor of the province of Louisiana, and restored to the Intendant.

Choppin v. Michel, 233.

LETTING AND HIRING.

I. *Letting of Things.*

II. *Hire of Labor or Industry.*

I. *Letting of Things.*

1. Where a lessee for years, and his surety, abandon the premises, the lessor, for the preservation of the property and the protection of his rights, may collect the rent due from the sub-tenants, and procure new ones, for the benefit of the lessee or surety; and where the lessor has never refused to place the premises under their control on their complying with the lease, such acts will not be considered as amounting to a cancelling of the lease, and the lessee and his surety will be bound for the difference between the amount of the lease and that received from the sub-tenants. *Roumage v. Blatrier*, 101.
2. Where pending an action to enjoin an execution issued on a judgment obtained by a lessor against the surety of his lessee, for the amount of a lease for years, to be paid from time to time as the rent may become due under the lease, the lessor sells the premises, without any stipulation that the sale is made subject to the lease, the lease will be thereby dissolved. *Ib.*
3. Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So, where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Miller v. Michoud*, 225.
4. Permission to occupy certain premises, without pay, on condition of leaving whenever required by the owner to do so, does not give rise to the relation of landlord and tenant between the parties, nor invest the owner with the lessor's lien or privilege, or right of sequestration. A stipulation for rent is of the essence of the contract of lease. *Fisk v. Moores*, 279.
5. The provision of the second section of the act of 3 March, 1819, which declares that no appeal, taken from a judgment in favor of a landlord in an action to recover possession of the premises after the termination of the lease, shall suspend execution, is, as to judgments rendered in such cases by the City Court of New Orleans, virtually repealed by ss. 4, 5 of the act of 10 March, 1838; and a suspensive appeal may be obtained in all such cases, on

giving bond, with sufficient surety, for any damage which the appellee may sustain in consequence of the delay occasioned thereby.

State v. Judge of City Court of New Orleans, 394.

II. Hire of Labor or Industry.

6. Public notice given by a railroad company that all baggage is at the risk of the owner, not brought home to the owner, will not exonerate the company from liability as carriers. *Logan v. Pontchartrain Railroad Company*, 24.
7. In an action against a railroad company, to recover the value of baggage lost, it was proved to be the usage on the road for a car to run to the end of the pier forming one of the *termini* of the road, and take from steamers all the baggage and effects of the passengers, and to return to the ticket office, a short distance from the pier, where passengers were at liberty to take off their baggage without charge, the car proceeding with the remaining baggage; and that there was no person employed by the company to take care of the baggage, each passenger being expected to look out for his own. It was proved that the plaintiff's baggage was put on the car at the end of the pier, and that he did not accompany it, but took his passage in the succeeding train. Its loss and value were established. *Held*, that the baggage was lost by the carelessness of the company; that their responsibility attached as soon as the baggage was received on the car at the end of the pier; and that the plaintiff's not accompanying his baggage does not excuse the negligence of the carriers. Judgment for the plaintiff. C. C. 2722, 2725. *Ib.*
8. Where one employed as salesman by the year, at a fixed salary, is discharged before the end of the year, without any serious ground of complaint, he will be entitled to his salary for the whole term for which he was engaged.

Decamp v. Hewitt, 290.

LIEN.

See PRIVILEGE 6, 7.

LITIGIOUS RIGHT.

Art. 2622 of the Civil Code, which provides that one against whom a litigious right has been transferred, may release himself by paying to the transferee the real price of the transfer, with interest from its date, relates only to conventional assignments. It does not apply to a transfer resulting from a sheriff's sale under execution, the transferee acquiring all the rights of the owner of the right sold. C. P. 647, 690. *Succession of Tilghman*, 124.

MANDAMUS.

The jurisdiction of the Supreme Court being appellate only, and limited by the Constitution (art. 4, s. 2,) to civil cases in which the matter in dispute exceeds three hundred dollars, it cannot issue a *mandamus* to an inferior tribunal where the amount in dispute is under that sum. A *mandamus* can be issued by the Supreme Court only in aid of its appellate jurisdiction. C. P. 829, 839.

State v. Parish Judge of Plaquemines, 285.

See MORTGAGE 2.

MARSHAL.

A marshal is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau v. Valetou*, 218.

MINOR.

1. A tutor, as such, without letters of administration, has no authority to administer a succession in which his pupil has an eventual or residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors, as well as of the beneficiary heirs entitled to the residue after the payment of debts. *Beale v. Walden*, 67.
2. In the alienation of the property of minors, the advice of a family meeting forms an essential part of the judgment or *basis* upon which it rests. Though the Civil Code does not expressly require that the family meeting shall be held in the parish in which the court sits, such must be considered as the true construction of all its provisions, taken together. C. C. 305, 308. Act 10 March, 1834, s. 1. *Ib.*
3. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Baldwin v. Carleton*, 109.
4. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*
5. A memorandum at the bottom of an account rendered by plaintiff's tutor, in 1828, stated, that there was a note belonging to the estate of the minor, deposited in the office of the parish judge, which, when collected, would be accounted for. A further account was rendered in July, 1834, not including any part of the proceeds of the note, nor alluding to it, and the minor, who was emancipated by marriage, assisted by her husband, a few days after gave the tutor a receipt for the full amount coming to her, and a complete discharge. In February, 1844, plaintiff sued the heirs of the tutor, to recover her share of the proceeds of the note: *Held*, that the action was prescribed by art. 356 of the Civil Code. *Offutt v. Collins*, 491.
6. A minor cannot sue in his own name, but only in the name of his tutor, duly qualified to act as such. *Per Curiam*: A judgment would not be *res judicata* as to the minor, unless it appeared that the person assuming to represent him was duly qualified. Nor would the defect be cured by suing in his name, assisted by his father. *Mayes v. Smith*, 503.
7. A natural tutor must take an oath before he can act as such. C. C. 328. *Ib.*
8. The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or

of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard v. Deuel*, 508.

9. The nullity resulting from the adjudication of the property of minors at a price less than the appraisement, is a relative one, of which they alone can take advantage. *Per Curiam*: The formalities prescribed for the sale of property of minors are exclusively for their benefit. *Ib.*

MORTGAGE.

1. Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicile or usual place of residence at the time of the inscription, it becomes a vested right (C. C. 3318), and cannot be destroyed by any act of the mortgagor, nor of third persons. Consequently, where the mortgagor subsequently acquired a domicile in another parish, a re-inscription in the parish to which the debtor removes, is not necessary to preserve the mortgage. *Commissioners of New Orleans Improvement and Banking Company v. Jewett*, 20.
2. A bankrupt, discharged by a District Court of the United States under the act of 1841, has a right to have the mortgages recorded against him for the purpose of securing debts from which he has been discharged, erased, so far as they may effect his future property. And where a rule has been taken in the District Court on the recorder and the mortgagees, to show cause why the mortgages should not be erased, and no cause has been shown, and the rule has been made absolute, and the recorder refuses to make the erasure, a mandamus may be obtained from a state court to compel him to do so. *Per Curiam*: As the debts secured by the mortgages cannot be recovered but in the event of the certificate being annulled for fraud, it is unjust, in the absence of any such charge, that the mortgages should stand recorded as operating on the future property of the bankrupt. *Diggs v. Prieur*, 54.
3. A Recorder of Mortgages cannot be compelled to erase a mortgage without making the mortgagee a party to the proceedings, unless a judgment ordering the erasure has been rendered contradictorily with the latter.
Delavigne v. Gaienné, 171.
4. Where a mortgage has been erased in pursuance of a judgment of a court of competent jurisdiction, rights acquired by subsequent mortgagees, before any proceedings to annul the judgment, will not be affected by any illegality in it. Third persons are not bound to look beyond the judgment, which, if rendered by a court of competent jurisdiction, must have its full effect, and can only be annulled by a direct action. *Aliter*, as to the parties themselves, or their *ayans-cause* with notice; as to them, the rights of a mortgagee cannot be affected by any order or decree in a case to which he was not a party. *Ib.*
5. Property not subject to alienation cannot be mortgaged. C. C. 3256.
Miller v. Michoud, 225.
6. Where a lessee of ground constructs buildings or other works thereon, with his own materials, the owner of the soil may keep them on paying the value of the materials and the price of the workmanship. C. C. 497, 498, 500. The lessee having only the right, at the expiration of the lease, to claim the value

of the materials and the price of the workmanship, such buildings or works can neither be alienated nor mortgaged by him. He may alienate his right to claim compensation, or to take the buildings away; but such a right is not susceptible of being mortgaged. So, where, by the terms of the lease, any buildings erected by the lessee are to become the property of the lessor at its expiration, without his being bound to pay any compensation therefor, the lessee has only a mere moveable right of possession and enjoyment, incapable of being mortgaged. *Ib.*

7. An executor cannot grant a mortgage on any part of his testator's estate; nor can a Probate Court authorise him to do so, though for the purpose of releasing other property of the succession, already mortgaged, with a view to sell it. *Pilié v. Citizens' Bank of Louisiana*, 248.
8. Where a partner in a particular partnership, entitled to an undivided third of certain immovable property, permits his copartner to mortgage the whole for the payment of an individual debt of the latter, he may be estopped from disputing the mortgage; but such permission will not amount to a renunciation of his title, nor to an acknowledgement of the mortgagor's title to the whole of the property. *Thomson v. Mylne*, 349.
9. Though a contract by which a party alleges that he sells, and actually delivers certain lands and slaves to his endorers, to be held by them until indemnified for their endorsements, reserving a right to redeem the slaves on discharging the endorers from any liability, be decided by the Supreme Court to be a mortgage and not a sale, it must be duly recorded to entitle the endorers to the privilege of hypothecary creditors, as against other creditors having mortgages regularly registered. *Succession of Hutchings*, 512.

See BANK, 6.

NEW ORLEANS, CITY OF.

Where proceedings instituted by one of the Municipalities of New Orleans, under the act of 3 April, 1832, regulating the opening and improving of streets and public places, have been discontinued before any final confirmation by the court of the report of the assessors, the owners of property required for the improvement, and assessed at a certain price, cannot claim the amount on the ground of an implied sale, though the Municipality have taken possession of the premises. *Per Curiam*: The proceedings not having been perfected, the parties can claim no rights under them; the plaintiffs can only demand the premises, or damages for the injury resulting from having been deprived of them. *Hullin v. Second Municipality of New Orleans*, 97.

NON-SUIT.

Where, in an action against an accommodation endorser, the plaintiff has had a fair opportunity for making out his case, and has failed, the court will not render a judgment as in case of non-suit, on the mere suggestion that the notary, who was not examined as a witness, might, on another trial, testify to facts that would entitle the plaintiff to recover. *Dupré v. Richard*, 495.

NOTARY.

1. A notary cannot testify as to any thing which will contradict or strengthen his official acts. *Follain v. Dupré*, 454.
2. The notary by whom a protest was made and notice given of the protest of a note or bill, is a competent witness to prove the protest and notice. He is not disqualified by his liability for neglect or mistakes in the discharge of his official duties. *Ib.*

NOVATION.

1. Novation will not be presumed. The intention to make a novation must clearly result from the terms of the agreement. C. C. 2186.
Czarnowski v. Czarnowski, 9.
2. An order written by the maker on the back of a promissory note, while in the hands of an endorsee to whom it has been transferred after maturity, requesting a third person to pay the note on a day named, is a mere indication by the debtor of a person who is to pay in his place, and does not operate a novation of the debt. On the failure of the person indicated to pay, the maker will be responsible. C. C. 2188, 2190. *Muggah v. Rogers*, 511.

OFFENCES AND QUASI-OFFENCES.

1. Where a sequestration has been illegally issued, the true standard of damages is the probable loss sustained by the defendant in consequence of having been deprived of the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in, had the sequestration not been issued. *Sellick v. Kelly*, 145.
2. Defendants having attached certain bank bonds and notes belonging to plaintiff, and having recovered judgment in the court below, caused them to be sold under a *fi. fa.* The judgment was reversed on a devolutive appeal. Plaintiffs, in an action for damages for the illegal attachment, having proved that the bonds and notes had fallen in value pending the seizure, and that they were sold for much less than they might have been sold for had no attachment been issued: *Held*, that the defendants should pay the actual damages caused by their attachment. *Horn v. Bayard*, 259.
3. A sale of the contents of a coffee-house or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas v. Lanata*, 286.
4. In an action by plaintiffs against defendants for a trespass on their lands, by cutting timber, etc., it was proved that defendant had purchased timber from persons who had settled on the land claimed by plaintiffs, and been left in quiet possession. There was no evidence that they were informed of plaintiffs' title, nor was there any knowledge of it brought home to defendant. The sale by which plaintiffs acquired their title, did not appear to have been recorded in the parish in which the land was situated: *Held*, that there must be judgment for the defendant. *Banks v. Doughty*, 483.

OPPOSITION OF THIRD PERSONS.

Where the proceeds of property seized and sold under a *fi. fa.* are claimed in virtue of a previous seizure under a *fi. fa.*, the claimant must oppose, by way of third opposition, the application of the proceeds to the satisfaction of the second execution. C. P. 396, 397, 401, 402.

Sheldon v. New Orleans Canal and Banking Company, 181.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, 7, 10, 11.

PARTIES.

See EVIDENCE, 49, 50. PLEADING, I.

PARTNERSHIP.

1. Where, in an action for the settlement of partnership accounts, the defendant, in whose hands the books, accounts, and evidences of debts due to the firm remained at the time of its dissolution, is proved to have admitted that there were outstanding debts due the partnership to a certain amount, and he states in his answer that he will file a list of them, but omits to do so, and shows no diligence in collecting them, judgment will be given against him for a sum equal to the plaintiff's share in the debts due to the partnership at the time of its dissolution. *Cazeau v. Faget*, 10.
2. After the dissolution of a partnership, no one of the partners can use the social name so as to bind the rest. To draw or endorse a note in the name of the partnership, the authority must be express and special.
Carr v. Woods, 95.
3. One who has paid in consequence of his endorsement given to the liquidating partners after the dissolution of the partnership, cannot, as endorser, recover of the other partners on the note thus paid by him, although the consideration of the note was a debt due by the firm; nor can he recover on an account, stating such payment as an item. He might recover on showing that he had paid a debt due before the dissolution of the partnership, to the extent to which the partnership had profited by the payment. *Ibid.*
4. Where one person furnishes the funds to purchase an article, and another his credit, skill, and industry in preparing it for sale, in order that a profit may be made for their mutual benefit, it will constitute a partnership.
Bank of Tennessee v. McKeage, 130.
5. Whoever shares in the profits of a partnership is a partner, and as such responsible for its debts, though his name be not in the firm. *Ib.*
6. Partnership property is liable to the creditors of the partnership in preference to those of the individual partner. C. C. 2794. *Ib.*
7. The share of a member of a partnership may be seized and sold to satisfy his individual creditors, subject to the debts of the partnership; and such seizure, if legal, operates a dissolution of the partnership. C. C. 2794. But a creditor of one partner cannot seize under execution, or attach any particular thing or piece of property belonging to the partnership, nor any portion of it, to satisfy

his debt. The whole share or interest of the indebted partner in the partnership must be seized or attached, when the partnership will be dissolved, and the creditor entitled to satisfaction out of the share of his debtor, after payment of the partnership debts. The interest of a partner is a distinct thing, and must be taken as a whole. *Ib.*

8. A District Court has jurisdiction of an action by the executor of a deceased partner against the survivor, for a settlement of the partnership accounts.

Thomson v. Mylne, 349.

9. A balance due by the succession of one of the members of a particular partnership to his co-partner, for the price of his share in a plantation cultivated by them in partnership, is not a partnership debt to be satisfied out of the partnership property. The survivor is not a creditor of the partnership, but of his deceased partner. *Ib.*

10. After the dissolution of a partnership, no one of the partners can bind the others by the use of the social name, nor by any acknowledgment of a debt or or account. *Dupré v. Richard*, 497.

PLEADING.

I. *Parties to Actions.*

II. *Actions, Where to be brought.*

III. *Of the Petition.*

IV. *Exceptions and Answer.*

V. *Demands in Compensation and Reconvention.*

VI. *Intervention.*

VII. *Admissions.*

VIII. *Interrogatories to a Party.*

IX. *Proceedings against an Attorney at Law to Cancel his License.*

I. *Parties to Actions.*

1. An heir cannot be effected by any claim of an executor, unless personally cited to contest it. *Baldwin v. Carleton*, 109.
2. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his undertutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Ib.*
3. A minor is not bound to resort to an appeal or action of nullity, to protect himself against a judgment rendered against him when not legally represented. Such a judgment must be considered as one rendered without parties, and absolutely void. *Ib.*
4. In joint demands one of the creditors cannot represent the debtor. *Ib.*
5. A Recorder of Mortgages cannot be compelled to erase a mortgage without

making the mortgagee a party to the proceedings, unless a judgment ordering the erasure has been rendered contradictorily with the latter.

Delavigne v. Gaienné, 171.

6. Action by certain creditors of a company against the commissioners appointed for the liquidation of its affairs, claiming a privilege on its property, and praying that it may be sold for the payment of their debts. It appeared from different acts of the legislature, that the State claimed a privilege on the property of the company, and to have subsequently become, by a forfeiture, declared by an act of the legislature, the actual owners of the property, which act directed the treasurer of the State to sell the same. No citation or other notice of the proceedings was given to the governor, treasurer, attorney general, or district attorney, but judgment was rendered declaring the act pronouncing the forfeiture unconstitutional, the State not to be the owner of the property, and ordering it to be sold by the commissioners, reserving, for a future decision, the question of the privileges of the different creditors. On appeal: *Held*, that the State not having been cited, nor notified of the proceedings, the judgment must be reversed, and the case remanded for a new trial, after the State shall have been notified through the proper officers.

Perry v. Commissioners of Clinton and Port Hudson Railroad Company, 404.

7. The defendant in an action of boundary cannot, under the allegation that, if the boundary claimed by plaintiff be established, his own boundaries will be so altered as to include land held by third persons, claim to have them made parties to the suit. *Per Curiam*: The defendant had no right to call his vendors in warranty; the plaintiff did not seek to evict him from any land sold to him, but only to establish that he had improperly changed his boundaries.

Duplessis v. Lastrapes, 451.

8. A minor cannot sue in his own name, but only in the name of his tutor, duly qualified to act as such. *Per Curiam*: A judgment would not be *res judicata* as to the minor, unless it appeared that the person assuming to represent him was duly qualified. Nor would the defect be cured by suing in his name, assisted by his father. *Mayes v. Smith*, 503.
9. As a general rule, a purchaser who has been evicted can sue only his immediate warrantor. There is an exception to this rule, where the purchaser has been subrogated by the vendor to his action of warranty.

Smith v. Wilson, 522.

II. Actions, Where to be brought.

10. An action of revendication of real property may be instituted before the court within whose jurisdiction the property is situated, though the domicile of the defendant be in another district, or before the court of his domicile, at the option of the plaintiff. C. P. 163.

Second Municipality of New Orleans v. Garland, 387.

III. Of the Petition.

11. A plaintiff may set forth in his petition different grounds upon which he expects to recover, provided he do not make demands one of which necessarily excludes the other. C. P. 149. *Montross v. Hillman*, 87.
12. One who has paid in consequence of his endorsement, given to the liqui-

dating partners after the dissolution of the partnership, cannot, as endorser, recover of the other partners on the note thus paid by him, although the consideration of the note was a debt due by the firm; nor can he recover on an account, stating such payment as an item. He might recover on showing that he had paid a debt due before the dissolution of the partnership, to the extent to which the partnership had profited by the payment.

Carr v. Woods, 95.

13. Plaintiffs having advanced to defendant a certain sum on merchandise consigned to their house in another city, defendant drew a bill on the consignees, in their favor, for the amount advanced. The proceeds of the shipment falling short of the advance, plaintiffs sued for the difference, on an account debiting defendant with the amount of the bill, and crediting him with the nett proceeds of the sale. On an objection that the action should have been on the bill: *Held*, that the suit was properly brought. *Hewitt v. Sloan*, 281.

14. Where factors accept and pay a draft drawn on them, and charge it to the drawer in their account current, with a commission for making the advance, they cannot separate the draft from the account, and sue on it alone.

Dubose v. O'Bryan, 514.

IV. *Exceptions and Answer.*

15. After a judgment by default, no dilatory plea can be received.

Young v. Patterson, 7.

16. An exception that the petition contains contradictory allegations, and that plaintiffs cannot proceed without selecting the ground of their action, relates to the substance, not to the form of the action, and may be pleaded at any time before judgment. C. C. 344, 345. *Montross v. Hillman*, 87.

17. A defendant in a petitory action may defend himself by setting up title in a third person. *Choppin v. Michel*, 233.

18. Where a petitioner alleges that defendants are indebted to him in a certain sum, for which he had recovered judgment against them in another State, and prays that they may be cited to answer, for judgment, and for an attachment, and he subsequently obtains an order rendering the foreign judgment executory in this State, he may have the latter order annulled, on motion, *ex parte*; and where defendants appear and answer to the merits, without excepting to the previous proceedings, any irregularities will be considered as waived.

Hazard v. Agricultural Bank of Mississippi, 326.

19. Where a party excepts to the jurisdiction of the court, but proceeds to trial without asking for judgment on his exception, it will be presumed to have been waived. *Thomas v. Clement—Re-hearing*, 402.

20. Under no circumstances can a supplemental answer be permitted to be filed, after the evidence has been concluded.

United States v. Bank of the United States, 418.

21. Want of jurisdiction, *ratione personæ*, cannot be pleaded by a party who has voluntarily submitted to the jurisdiction of the court. *Ib.*

22. Where a defendant in an action commenced by injunction, excepts to answering to the merits, on the ground that the oath taken and the bond given to obtain the injunction, were taken and executed by one claiming to act as the

attorney in fact of the plaintiff, though no copy of the power was annexed to the petition, the power must be produced, or the action will be dismissed. C. C. 320. *Mayes v. Smith*, 503.

V. *Demands in Compensation and Reconvention.*

23. A plea of compensation is in the nature of a demand, and should be accompanied with a specification of the particular amount expected to be compensated, of the manner in which the party who claims the benefit of it acquired a right thereto, and with every circumstance of time and place which ought to be given in other demands. *Wilcox v. His Creditors*, 346.

See COURTS 8.

VI. *Intervention.*

24. The creditors of one who had commenced an action against a succession, claiming to have been the husband of the deceased, and to be entitled, as such, to one half of the property in her possession at the time of her death as community property, may intervene and prosecute the claim, where they apprehend that the plaintiff is about to abandon it for the purpose of defrauding them. C. C. 1985. *Succession of Baum*, 314.
25. An action having been commenced by a party to cause himself to be recognised as the husband of the deceased, claiming his portion of certain property as having belonged to the community, his creditors intervened, praying to be allowed to prosecute the suit, on the ground that plaintiff was about to abandon it for the purpose of defrauding them. A supplemental intervention was subsequently filed by the same parties, alleging that, since the date of their intervention, they had purchased all the rights of the plaintiff in the action, and praying to be allowed to prosecute it to a decision. On an exception that the supplemental intervention set up a new cause of action, and was therefore inadmissible: *Held*, that the supplemental intervention does not in any manner change the substance of the original demand that the plaintiff be recognised as the husband of the deceased, but merely the parties to the proceedings, and that it should be received. C. P. 364. *Ib.*
26. The law authorises those whose interests may be effected by an action pending between others, to intervene, and join one of the parties, or oppose both; but they cannot be compelled to do so. C. P. 389, 390. Act 7 April, 1826, s. 10. They may institute a separate action against either, or both of the parties litigant. C. P. 391. But should any of their rights be lost or impaired, in consequence of their neglect or failure to intervene, after notice of the proceedings likely to affect them, they must bear the consequences. *Hazard v. Agricultural Bank of Mississippi*, 326.
27. A garnishee is but a stakeholder; he has nothing to do, but to take care of himself. He cannot interfere between the plaintiff and defendant, nor others claiming what he holds or owns, but must pay to whomsoever the court may order him. *Ib.*

VII. *Admissions.*

28. A non-resident may appeal at any time within two years from the day on which final judgment was rendered (C. P. 593); and where the plaintiff

allege in their petition and affidavit for an attachment, that the defendants reside out of the State, they will be concluded thereby.

Kraeutler v. Bank of United States, 213.

VIII. Interrogatories to a Party.

29. Where, in answer to an interrogatory, a party states facts not necessarily connected with that as to which he was interrogated, such irrelevant matter will be struck out, on motion. *Smith v. Richardson*, 516.

IX. Proceedings against an Attorney at Law to Cancel his License.

30. The license of an attorney at law cannot be withdrawn or annulled, unless on conviction in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the District Court of the domicile of the accused; and there must be a trial by jury. Act 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1. *Chevalon v. Schmidt*, 91.

POSSESSION.

Where the vendor and vendee of an immovable reside in the same house, possession follows title. *Wederstrandt v. Marsh*, 533.

See PRESCRIPTION, 1, 2, 14, 15.

PRESCRIPTION.

1. It is only after an uninterrupted possession of three successive years, that one who purchased a thing stolen or lost, at public auction, or from a person in the habit of selling such things, can demand the price he paid for it of the rightful owner, who claims the property. C. C. 3472, 3473, 3474.
Campbell v. Nichols, 16.
2. To make out a title by prescription, such as will authorise a recovery in a petitory action, where possession has been decreed to be in the other party, plaintiffs must, at least, show clearly that, before possession was decreed to their adversary, they held peaceable, public, continuous, uninterrupted and unequivocal possession, a sufficient length of time, under a just title, with proof of the exact commencement of that possession. C. C. 3452, 3453.
Prevost v. Ellis, 56.
3. One employed to superintend draymen, and to keep the accounts and make out the bills of his employer, is neither a *workman*, *laborer*, nor *servant*, within the meaning of art. 3499 of the Civil Code. The word *servant* in that article means a menial servant. The prescription applicable to the claim of one employed as such superintendent or clerk, is that of three years, established by art. 3503. *Keaghey v. Barnes*, 139.
4. The curator of a succession credited himself in his account with a sum, exceeding the amount of the assets of the succession in his hands, which he claimed in consequence of eviction from land sold to him by the deceased. On the opposition of the heirs it was decided, that the claim of the curator, so far as it exceeded the assets in his hands, was prescribed, and judgment was rendered allowing his claim to the amount of such assets. On appeal: *Held*,

that the claim was an entire one, arising from the same cause, and could not be prescribed in part; and that the account should be homologated.

Succession of Durnford, 183.

5. Where plaintiffs, having failed in obtaining their evidence in time for a trial urged by the opposite party, were unable to make out their case, and the court ordered a dismissal as in case of non-suit, they will not be regarded as having abandoned the suit within the meaning of art. 3485 of the Civil Code, which declares that where a plaintiff abandons, or discontinues his case, prescription shall be considered as not having been interrupted thereby.

Dunn v. Kenney, 249.

6. Excessive or inofficious donations—actions for the reduction of which are prescribed by five years, where the person entitled to exercise them is in the State, and by ten years if out of it, under art. 3507 of the Civil Code, are those dispositions which fathers and mothers, or other ascendants make of their property to the prejudice of their descendants, beyond the proportion reserved to them by law. C. C. 3522, s. 21. *Lagrange v. Barré*, 302.

7. An action to annul a donation *inter vivos*, in consequence of the donor's not having reserved property enough for his subsistence, is not prescribed by five years. From considerations of public order, such a donation is declared, by art. 1484 of the Civil Code, to be absolutely null. *Id.*

8. Plaintiff having commenced an action against a succession to cause himself to be acknowledged as the husband of the deceased, neglected for more than three years to take any steps in it, when certain creditors intervened, praying to be allowed to prosecute the action on the ground that the plaintiff was about to abandon it for the purpose of defrauding them. The latter subsequently attempted to discontinue, but his motion was overruled. *Held*, that the prescription of one year established by art. 1989 of the Civil Code is inapplicable to the claim of the intervenors, who do not seek to revoke any contract or act of any kind, but simply to intervene in an action for the protection of their rights. *Succession of Baum*, 314.

9. Prescription is interrupted by a *cessio bonorum* made by the debtor.

Wilcox v. His Creditors, 346.

10. Prescription runs against a vendee's action of warranty from the date of the eviction, and not from that of the sale.

Thomas v. Clement—Re-hearing, 403.

11. A plaintiff who holds under an act of sale which expressly declares that the vendor sells only such rights as he has to the property, and that the vendee has a knowledge of his title thereto, has not acquired such a just title, translativo of property, as will serve as a basis for the prescription of ten years.

Avery v. Allain, 436.

12. An endorsement of a partial payment, in the hand writing of the holder of the note, without other proof that a payment was made at the date mentioned in the endorsement, is insufficient to interrupt prescription.

Splane v. Daniel, 449.

13. A memorandum at the bottom of an account rendered by plaintiff's tutor, in 1828, stated that there was a note belonging to the estate of the minor, deposited in the office of the parish judge, which, when collected, would be

accounted for. A further account was rendered in July, 1834, not including any part of the proceeds of the note, nor alluding to it, and the minor, who was emancipated by marriage, assisted by her husband, a few days after gave the tutor a receipt for the full amount coming to her, and a complete discharge. In February, 1844, plaintiff sued the heirs of the tutor, to recover her share of the proceeds of the note: *Held*, that the action was prescribed by art. 356 of the Civil Code. *Offutt v. Collins*, 491.

14. The *just title* required to enable a possessor to acquire property in a slave by the prescription of five years where the parties are present, and by ten years between absentees, must be one derived from a person whom the possessor honestly believed to be the real owner: and it must be such as would, in its nature, suffice to transfer the property, if derived from the real owner. C. C. 3437, 3439, 3450, 3451. *Sandoz v. Gary*, 529.
15. A slave may be acquired by the prescription of fifteen years without any title on the part of the possessor, and whether he be in good faith or not, and this prescription runs against absentees as well as residents; but the possession must be continuous, uninterrupted, public, unequivocal, and *animo domini*. C. C. 3465, 3466. *Ib*,

PRESUMPTION.

See EVIDENCE, II. PLEADING, 19.

PRIVILEGE.

1. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with surety, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplessis v. His Creditors*. 4.
2. Law charges are the costs incurred in court in the prosecution of a suit, to be paid by the party cast. Such costs, when taxed according to law, are privileged against the insolvent's estate, whether incurred previously to the insolvency, or in the *concurso*. C. C. 3162, 3163.

Barkley v. His Creditors, 28.

3. The costs of the proceedings incurred in establishing a charge of fraud against an insolvent, are included among the law charges privileged against the estate. *Barkley v. His Creditors*, 28.
4. Plaintiffs having sold to defendant a quantity of cotton, delivered it to him on receiving only a part of the price. The purchaser shipped the cotton, consigning it to a house of which the intervenor was a member, for sale on account of the shipper; and, in consequence of advances made by the intervenor, had the bill of lading made out in the name of the latter. Plaintiffs having sued to recover the balance of the price, sequestered the cotton; and the party who had made the advances intervened, claiming a privilege on its proceeds. *Held*, that by delivering the cotton before payment in full, the vendors authorised defendant to consider himself its absolute owner; that by suffering the intervenor to take the bill of lading in his name, defendant gave him the same right to the cotton from the date of the bill, as if he had endorsed to him a bill of lading filled up in defendant's own name, which would transfer the property; that the privilege of the vendor, under art. 3194 of the Civil Code, exists only so long as the property remains in possession of the purchaser; and that under art. 3214 of the Civil Code, the intervenor was entitled to a privilege on the proceeds of the cotton, for the advances made by him.

Laughlin v. Ganahl, 140.

5. Permission to occupy certain premises, without pay, on condition of leaving whenever required by the owner to do so, does not give rise to the relation of landlord and tenant between the parties, nor invest the owner with the lessor's lien or privilege, or right of sequestration. A stipulation for rent is of the essence of the contract of lease. *Fisk v. Moores*, 279.
6. Liens and privileges are *stricti juris*, and exist only where they have been expressly given by law. *C. C. 3152. Ib.*
7. The seizure under a *fi. fa.* of the interest of a debtor in notes, entitles the seizing creditor to be paid by preference out of the proceeds.

Lafleur v. Hardy, 493.

PROVISIONAL SEIZURE.

Property, provisionally seized, having been released on the execution of a bond with surety, plaintiff obtained judgment, and issued a *fi. fa.*, which was returned "no property found after demand of the parties." On a rule against the surety, to show cause why execution should not be issued against him, the latter introduced a witness who stated that he had notified plaintiff and the sheriff, that the property originally seized was within the jurisdiction of the court, and requested him to seize it, informing him where it was. *Held*: That the rule should be made absolute. *Walden v. Philips*, 123.

QUASI-CONTRACTS

1. Where proceedings instituted by one of the Municipalities of New Orleans, under the act of 3 April, 1832, regulating the opening and improving of streets and public places, have been discontinued before any final confirmation by the court of the report of the assessors, the owners of property required for the improvement, and assessed at a certain price, cannot claim the amount on the

- ground of an implied sale, though the Municipality have taken possession of the premises. *Per Curiam*: The proceedings not having been perfected, the parties can claim no rights under them; the plaintiffs can only demand the premises, or damages for the injury resulting from having been deprived of them. *Hullin v. Second Municipality of New Orleans*, 97.
2. Money paid through error, the debt having been previously satisfied, may be recovered back. *C. C. 2129, 2280. Beasley v. Allen*, 502.

QUASI-OFFENCES.

See OFFENCES AND QUASI-OFFENCES.

RECEIVER.

See SEQUESTRATION, 3.

RECONVENTION

See SUCCESSIONS, 9.

REGISTRY.

1. Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicil or usual place of residence at the time of the inscription, it becomes a vested right (*C. C. 3318*), and cannot be destroyed by any act of the mortgagor, nor of third persons. Consequently, where the mortgagor subsequently acquired a domicil in another parish, a re-inscription in the parish to which the debtor removes, is not necessary to preserve the mortgage. *Commissioners of New Orleans Improvement and Banking Company v. Jewett*, 20.
2. The seventh section of the act of 25 March, 1810, requiring notarial acts concerning immovable property to be recorded in the office of the parish judge where the property is situated, was not repealed by the promulgation of the Civil Code. Under that act, contracts of sale of real property, not recorded, are void as to third persons. *Prevost v. Ellis*, 56.
3. Though a contract by which a party alleges that he sells, and actually delivers certain lands and slaves to his endorsers, to be held by them until indemnified for their endorsements, reserving a right to redeem the slaves on discharging the endorsers from any liability, be decided by the Supreme Court to be a mortgage and not a sale, it must be duly recorded to entitle the endorsers to the privilege of hypothecary creditors, as against other creditors having mortgages regularly registered. *Succession of Hutchings*, 512.

SALE.

- I. *Requisites and Proof of Sale, and Effect thereof.*
- II. *Privilege of Vendor.*
- III. *Warranty and Eviction.*
- IV. *Rescission.*
- V. *Judicial and other Public Sales.*

I. *Requisites and Proof of Sale, and Effect thereof.*

1. Plaintiff caused a carriage to be sent to his factors, to be forwarded to him when ordered. They sent it to a dealer in such articles, with instructions to sell it, and he sold it, at private sale, to defendant. It was not proved that the latter knew of the want of authority in the vendors. In an action against the purchaser to recover the carriage, or its value: *Held*, that the defendant acquired no right to the carriage, his vendors having none, nor any authority to convey any; and that the sale was null. C. C. 2427.
Campbell v. Nichols, 16.
2. The seventh section of the act of 25 March, 1810, requiring notarial acts concerning immovable property to be recorded in the office of the parish judge where the property is situated, was not repealed by the promulgation of the Civil Code. Under that act, contracts of sale of real property, not recorded, are void as to third persons. *Prevost v. Ellis*, 56.
3. Proof, by a subscribing witness, that an act of sale of real property *sous seing privé*, was signed and executed on the day of its date, is insufficient to give it effect from its date, as to third persons. Parol evidence is admissible only to prove the date of the act, as between the parties. *Ib.*
4. An act of sale of lands, passed in 1774 before a Spanish commandant in Louisiana, in the presence of two witnesses, which recites that the vendor did not sign it because he could not write, and that the title was delivered to the vendee who took immediate possession, and which had remained among the notarial records of the parish, is admissible in evidence to prove a title to the property. *Per Curiam*: The act would have been sufficient evidence of title under the Spanish law, which permitted parol sales of immovables; it has all the requisites of an authentic act; and the absence of the vendor's signature is sufficiently accounted for by the public officer who received it, the ordinary mark of a party to an authentic act not being required at that period.
Choppin v. Michel, 233.
5. Parol evidence is inadmissible to prove that a slave sold by defendant to plaintiff, was represented as possessing certain qualifications not mentioned in the act of sale. *Milliken v. Andrews*, 241.
6. Parol evidence is inadmissible to alter, modify, or contradict a written act of transfer of immovables or slaves, or to prove any agreement or stipulation beyond its contents, where there is no allegation of fraud, error or violence. C. C. 2256. But such evidence is admissible to prove that the adjudication price of real estate sold at auction, was paid to a creditor holding a mortgage on the property, and the manner of such payment. *Macarty v. Gasquet*, 270.
7. A purchaser of real estate cannot be affected by any agreement respecting its sale, made between his vendors and a former owner of the property, which was unknown to him at the time of the purchase, and not registered.
Lanfear v. Hunt, 284.
8. A sale of the contents of a coffee-house, or shop, by notarial act, accompanied by delivery, cannot be treated as a nullity; and where a *fi. fa.* is levied on the property as still belonging to the vendor, the plaintiff in execution will be responsible to the purchaser in damages. But where no serious injury is shown

to have been sustained by the plaintiff, and defendant acted without malice, the damages will be nominal only. *Presas v. Lanata*, 288.

9. One who has effected insurance on his life may assign the policy, or a part of it, to a *bona fide* creditor; but such an assignment will be without effect as to third persons, creditors of the insured, where there was no proof of notice to the assurers before the death of the assured, nor of the acceptance of the assignment by the transferee before that date, and the policy remained in the possession of the assignor. C. C. 1804, 2612, 2613.

Succession of Risley, 293.

10. The assignor of a debt is not divested of title, as to third persons, before notice to the debtor; till then the assignee has but an inchoate right. C. C. 2613. *Ib.*

11. Where a debt due to defendants by a note secured by mortgage, had been transferred to third persons by a notarial act recorded in the office of the parish judge, but, before notice of the transfer was given to the maker of the note, the debt was attached by a creditor of defendants, the attaching creditor will be entitled to be paid by preference out of the proceeds.

Hazard v. Agricultural Bank of Mississippi, 326.

12. By an act *sous seing privé*, signed by both parties, registered, on proof by a witness of the signatures of the parties, in a notary's office, and subsequently recorded in the office of the parish judge of the parish in which the land was situated, D. & Co. agreed to sell to the plaintiff one third of a plantation, with the slaves, etc. thereon, for a certain sum, payable in seven yearly instalments, the latter binding himself, should any amount remain unpaid at the end of the seven years, to give a special mortgage on the property, for such balance, with interest from that time. The contract stipulated, that the plaintiff should reside on the plantation, and manage it for a fixed salary; that the supplies should be furnished by D. & Co., and the crops sold by them, and that the proceeds of the sales, after deducting expenses, should be considered the annual product of the plantation, one third of which should be placed to the credit of the plaintiff; that the contract should continue for seven years, renewable if agreeable to all parties, but if a dissolution should take place, the value of the property to be fixed for settlement by mutual appraisement, or by public sale; that plaintiff should pay one third of what may be expended on certain proposed improvements, with interest, from the date of the advance by D. & Co. of the necessary sum, until plaintiff's share be paid; and that "the agreement should be regularly completed before a notary as soon as possible." *Held*, that the act was not merely a promise to sell, but an absolute sale, which vested the ownership of one third of the plantation, slaves, etc., in the plaintiff, from its date, the vendors becoming his creditors for the price; that the term of seven years was stipulated only in reference to the duration of the partnership; and that the declaration that the agreement should be completed as soon as possible before a notary, was not an essential condition of the contract, but a mere provision for securing regular evidence of the convention.

Thomson v. Mylne, 349.

13. A sale is complete between the parties as soon as there exists an agreement for the object and the price, though the object be not yet delivered, nor the

- price paid. C. C. 2414, 2431. And such a sale has effect against third persons from the date of its registry in the office of a notary, and the actual delivery of the thing sold. C. C. 2242, 2417. *Thomson v. Mylne*, 349.
14. A promise to sell amounts to a sale where there exists a reciprocal consent of both parties, as to the thing and the price. C. C. 2437. *Ib.*
15. A plaintiff who holds under an act of sale which expressly declares that the vendor sells only such rights as he has to the property, and that the vendee has a knowledge of his title thereto, has not acquired such a just title translatif of property, as will serve as a basis for the prescription of ten years.
Avery v. Allain, 436.
16. Plaintiff having purchased a slave from a third person, transferred to the latter in payment of the price a part of a twelve-month's bond. In taking out execution on the bond, plaintiff's attorney, by mistake, ordered the clerk to credit the execution with the amount of the part of the bond so transferred. The balance due on the bond having been collected by the sheriff, the transferee claimed to be paid the amount transferred to him out of the sum in the hands of the sheriff, in preference to the plaintiff: *Held*, that the transferee cannot be prejudiced by the mistake of the plaintiff's attorney, and is entitled to the amount claimed. *Garrett v. Morgan*, 447.
17. Action to recover certain slaves purchased by defendant from a third person, in whose possession they were at the time of the sale. It was proved that they had been brought into this State by the vendor as the administrator of the succession of plaintiff's ancestor, and had remained in his possession several years; that they had been seized under execution as the property of the vendor, and offered for sale, but were not sold in consequence of the general notoriety of the fact, that they were not the property of the party in whose hands they were seized; and that defendant was present when they were offered for sale, probably with a view to bid for them: *Held*, that the facts warrant the presumption that the defendant was aware of the defect in the title of his vendor. Judgment for the plaintiffs. *Jenkins v. Theriot*, 450.
18. In an action by plaintiffs against defendant for a trespass on their lands, by cutting timber, etc., it was proved that defendant had purchased timber from persons who had settled on the land claimed by plaintiffs and been left in quiet possession. There was no evidence that they were informed of plaintiffs' title, nor was there any knowledge of it brought home to defendant. The sale by which plaintiffs acquired their title did not appear to have been recorded in the parish in which the land was situated: *Held*, that there must be judgment for the defendant. *Banks v. Doughty*, 483.
19. Action by a wife for a separation of property, claiming a slave as paraphernal, and opposition by the creditors of the community. Plaintiff offered in evidence a notarial act of sale of the slave, in which the vendor acknowledged the receipt of a sum of money from the plaintiff, as the price. Plaintiff then offered parol evidence to prove that the transaction was in fact a *dation en payment*, and that the slave was given to plaintiff by her mother, as an advance upon her inheritance: *Held*, that the evidence was admissible to prove that the slave was acquired by the funds of the wife, and that, in this respect, it does not contradict the notarial act. *Gonor v. Her Husband*, 526.

20. Where the vendor and vendee of an immovable reside in the same house possession follows title. *Wederstrandt v. Marsh*, 533.

See 21, 34, *infra*.

II. *Privilege of Vendor.*

21. Plaintiffs having sold to defendant a quantity of cotton, delivered it to him on receiving only a part of the price. The purchaser shipped the cotton, consigning it to a house of which the intervenor was a member, for sale on account of the shipper; and, in consequences of advances made by the intervenor, had the bill of lading made out in the name of the latter. Plaintiffs having sued to recover the balance of the price, sequestered the cotton: and the party who had made the advances intervened, claiming a privilege on its proceeds. *Held*, that by delivering the cotton before payment in full, the vendors authorised defendant to consider himself its absolute owner; that by suffering the intervenor to take the bill of lading in his name, defendant gave him the same right to the cotton from the date of the bill, as if he had endorsed to him a bill of lading filled up in defendant's own name, which would transfer the property; that the privilege of the vendor, under art. 3194 of the Civil Code, exists only so long as the property remains in the possession of the purchaser; and that under art. 3214 of the Civil Code, the intervenor was entitled to a privilege on the proceeds of the cotton, for the advances made by him.

Laughlin v. Ganahl, 140.

III. *Warranty and Eviction.*

22. The obligations of a warrantor depend upon the law in force at the time of the sale. *Succession of Durnford*, 183.
23. Under the Code of 1808, the vendor was bound, in case of eviction of the purchaser, to pay him, in addition to the price, &c. the increased value of the property at the date of the eviction, though the purchaser did not contribute to such increase. Book 3, tit. 6, arts. 54, 57. The original price, added to the rents and profits, does not necessarily constitute the measure by which the liability of the warrantor is to be ascertained; other things must be taken into consideration; and the general rule, that damages are to be measured by the loss actually sustained, and not by the gains of which the party has been deprived, is inapplicable. *Ib.*
24. Defendants sold to plaintiff a tract of land, at the rate of ten dollars an *arpent*. The act of sale provided that, "within a reasonable time from the day of sale, a survey and plan of said tract shall be made by a duly commissioned surveyor, which plan shall be recorded and made part of this act," and that in case of plaintiff's eviction from any part of the land, or of its being found by the survey to contain less than the quantity for which he paid, defendants shall refund to the purchaser at the rate of ten dollars for every *arpent* deficient. No survey was made under this stipulation; but by a new survey, made by the United States in consequence of alleged errors in the first, the lines of the tract sold to plaintiff were altered, and a large portion of the land declared to belong to the United States. Plaintiff knew of this second survey and location, which was approved by the Commissioner of the Land Office more than ten years after defendants' sale to him, but he made no opposition to the pro-

ceedings, nor notified his vendors. After the land had been declared public, plaintiff purchased it from the United States at \$1 25 per acre, and immediately caused a survey to be made to ascertain the deficiency in the quantity purchased from defendants. In an action by plaintiff against defendants, claiming to be refunded at the rate of ten dollars an *arpent* for the deficiency: *Held*, that the stipulation to refund to the purchaser at that rate, must be confined to any deficiency ascertained by a survey made "within a reasonable time from the day of the sale;" that it was never contemplated to apply to an eviction occurring at a distant period—ten or eleven years after; that for such an eviction the vendee must be compensated for the damage actually sustained; and that the price paid by him to the United States for the land from which he was so evicted, is the measure of such damages.

Thomas v. Clement, 397.

25. To constitute an eviction it is not necessary that the purchaser should be actually dispossessed. It may take place where he continues to hold the property, if under a different title from that transferred to him by his vendor. *Ib.*
26. Prescription runs against a vendee's action of warranty from the date of the eviction, and not from that of the sale. *Thomas v. Clement—Re-hearing*, 402.
27. Where one, who sells all the rights, claims, or privileges he has or may have to a second concession in the rear of a front tract, without warranty, or stipulation to make a title, subsequently becomes the owner of part of the land in the rear, by purchase from a third person holding under another title, he may hold, against his vendee, the property thus acquired by him. *Per Curiam*: To hold him bound to make the title of his vendee good, would be to enforce a warranty of title, where none was intended to be given.
Avery v. Allain, 436.
28. As a general rule, a purchaser who has been evicted can sue only his immediate warrantor. There is an exception to this rule, where the purchaser has been subrogated by the vendor to his action of warranty.
Smith v. Wilson, 522.
29. Where a purchaser at a sheriff's sale sells the same property, and, in the act of sale, declares, that he thereby "subrogates the vendee to all the rights and privileges acquired by the sheriff's sale," the latter will be considered as subrogated to the action of warranty to which his vendor was entitled. *Ib.*
30. Where the vendee of a purchaser at a sheriff's sale, subrogated to the rights of the latter, is evicted by a mortgage creditor of the original debtor in execution, he will be entitled, under art. 711 of the Code of Practice, to an action of warranty against both the debtor and creditor in execution, for the reimbursement of the price paid by him; but upon the joint judgment, he must first take execution against the debtor, and, on its return no property found, may take out execution against the creditor. Art. 713 of the Code of Practice does not apply to such a case. *Per Curiam*: Both parties stand in the same position as if the eviction had taken place in consequence of a better title; and in equity each party is bound, to the extent to which he has profited by the sale, to refund to the purchaser who has been evicted. *Ib.*
31. The fact that a vendee of a purchaser at a sheriff's sale, subrogated to the

rights of his vendor, has recovered judgment against his vendor, on the ground of eviction, for the price paid, is no bar to an action by him against the debtor and creditor in the original execution, where the judgment so recovered has not been satisfied. *Smith v. Wilson*, 522.

IV. *Rescission.*

32. Where one purchases property from an absconding debtor, with notice that his object in selling it was to deprive his creditors of their recourse upon it, and such purchase operates to their injury, it will be annulled. C. C. 1973. But the purchaser, though in bad faith, will be entitled to a restitution of so much of the consideration or price paid by him, as he shall prove to have enured to the benefit of the creditors, by adding to the amount applicable to the payment of their debts. C. C. 1977. *Barker v. Phillips*, 190.
33. To annul a sale on the ground of fraud, the creditor must prove the inability of the debtor to pay his debts, and injury to himself. *Per Curiam*: A contract, though made in bad faith, cannot be rescinded by creditors unless it operate to their injury. C. C. 1973. *Lafleur v. Hardy*, 493.

See 35 to 41 and 47 to 49, *infra*.

V. *Judicial and other Public Sales.*

34. Property surrendered by an insolvent, subject to a mortgage, having been sold by his syndic, was purchased by the mortgage creditor, and the price retained in satisfaction of his claim. Bond was given by the creditor, with surety, for any amount which he might ultimately have to contribute towards the payment of the privileged expenses of the estate; but no mortgage was reserved on the syndic's sale, nor was it recorded in the office of the Recorder of Mortgages. The property was afterwards sold by the purchaser to a third person, to whom a certificate was delivered from the Recorder of Mortgages, showing that the property was clear of incumbrance. On a rule on the second purchaser, to show cause why the property in his hands should not be sold to satisfy the contribution due by his vendor, the mortgage creditor, for the privileged expenses of the estate: *Held*, that the defendant in the rule not being aware that his vendor was bound to pay any part of the price of the property as a contribution for privileged expenses, and neither the act of sale nor the *procès-verbal* of the adjudication having been recorded, and no mortgage or privilege reserved by the syndic, he could be made liable only in case of having expressly assumed the payment of the contribution. Rule discharged. C. C. 3238, 3314, 3317. *Duplessis v. His Creditors*, 4.
35. It is only after an uninterrupted possession of three successive years, that one who purchased a thing stolen or lost, at public auction, or from a person in the habit of selling such things, can demand the price he paid for it of the rightful owner, who claims the property. C. C. 3472, 3473, 3474.
- Campbell v. Nichols*, 16.
36. An action before the Commercial Court to annul a sale made by the sheriff of a District Court, and exception that the former court cannot annul, or set aside the proceedings of the latter: *Held*, that so far as the judicial proceedings of the latter are concerned, the Commercial Court is without jurisdiction;

but where the executory proceedings of a sheriff are set up by defendants as the basis of their title, they may be examined, and set aside, if illegal.

Mississippi Marine and Fire Insurance Company v. Bank of Louisiana, 47.

37. Where the notice of seizure under a *fi. fa.* is illegal, the sale will be set aside. *Ib.*
38. Where, after a seizure under a *fi. fa.*, the sheriff, on being enjoined from further proceedings, returns the writ into court, and under an *alias fi. fa.* proceeds to sell the property originally seized, without making any new seizure, the sale will be annulled. *Cochrane v. Bank of the United States*, 64.
39. The purchaser at a judicial sale, made under the orders of a Court of Probates, is not bound to look beyond the decree of the court recognising the necessity of the sale. He is bound to look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction, cannot be disputed. *Beale v. Walden*, 67.
40. In the alienation of the property of minors, the advice of a family meeting forms an essential part of the judgment or *basis* upon which it rests. Though the Civil Code does not expressly require that the family meeting shall be held in the parish in which the court sits, such must be considered as the true construction of all its provisions, taken together. C. C. 305, 308. Act 10 March, 1834, s. 1. *Ib.*
41. The act of 10 March, 1834, relative to the titles of purchasers at judicial sales, applied only to the actual and immediate purchaser at the judicial sale. The benefits of that act were extended to subsequent vendees, holding under the original purchaser at the judicial sale, by the act of 11 March, 1837. Consequently the homologation of the sale, on a monition sued out before the act of 1837, by one to whom an act of sale was executed, on an acknowledgment, at the foot of the *procès-verbal* of the auctioneer, made by the person to whom the property was adjudicated, that he had purchased the property for the former, will not cure any irregularities in the sale. *Ib.*
42. Art. 2622 of the Civil Code, which provides that one against whom a litigious right has been transferred, may release himself by paying to the transferee the real price of the transfer, with interest from its date, relates only to conventional assignments. It does not apply to a transfer resulting from a sheriff's sale under execution, the transferee acquiring all the rights of the owner of the right sold. C. P. 647, 690. *Succession of Tilghman*, 124.
43. The title of property sold at auction vests in the purchaser from the moment of the adjudication. C. C. 2586. *Macarty v. Gasquet*, 270.
44. Where one claiming under a *fi. fa.* produces the judgment, execution, sheriff's return thereon, and act of sale, it will be presumed that the formalities of the law have been complied with. It is for the other party to show that they have not been complied with. *Succession of Baum*, 314.
45. Where a purchaser of land at a sheriff's sale does not, at the time, exercise his right of requiring the sheriff to put him in possession, but permits a third person to occupy a part of the premises, he cannot afterwards, by a petition addressed to the judge of the court from which the execution was issued in chambers, obtain, in a summary way, an order directing the sheriff to put him in possession. *Bigler v. Brashear*, 500.

- 46 The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard v. Deuel*, 508.
- 47 The nullity resulting from the adjudication of the property of minors at a price less than the appraisement, is a relative one, of which they alone can take advantage. *Per Curiam*: The formalities prescribed for the sale of property of minors are exclusively for their benefit. *Ib*.
48. A sheriff's sale will not be annulled at the suit of a creditor of the defendant in execution, unless it be shown that the former has been injured thereby. *Per Curiam*: Though the acts of a debtor be illegal and fraudulent, yet if they cause no damage to any one, they will not be annulled.
Wederstrandt v. Marsh, 533.
49. The nullity resulting from a failure to advertise a sheriff's sale for the time required by law, is not an absolute one, and does not of itself annul the sale. The advertisements may be waived by the written consent of the parties. *Ib*.
50. Where a plantation is to be sold under execution, the debtor may require that the sale be made on the place itself. C. P. 665. *Ib*.

See 30, 31 *supra*.

SEQUESTRATION.

- Under art. 275 of the Code of Practice, or under the 9th section of the act of 7 April, 1826, to obtain a sequestration, the applicant must make oath that he fears that the party having possession of the property may remove it beyond the limits of the State during the pendency of the suit. It is not any privilege or mortgage which the creditor has on the property, but the circumstance which causes him to apprehend that its removal may deprive him of his recourse upon it, that gives the right of sequestration. The requisites for obtaining a sequestration under the act of 1826, where the party has a lien or privilege on the property, are the same as under section 6 of art. 275 of the Code of Practice, in cases in which the creditor has a special mortgage. *Sellick v. Kelly*, 145.
- Where a sequestration has been illegally issued, the true standard of damages is the probable loss sustained by the defendant in consequence of having been deprived of the free use or disposal of his property. He should be placed as nearly as possible in the situation he would have been in, had the sequestration not been issued. *Ib*.
- The law designates who the judicial sequestrator shall be, and the court cannot appoint another, unless by consent of parties. The parties to an action may select their own agents, and confer on them such powers as they think proper; but the court can impose no burdens or restrictions on such agents, not imposed by their principals. *United States v. Bank of United States*, 418.

SHERIFF.

A sheriff is the agent of the plaintiff in execution only so far as he derives authority from the writ placed in his hands. The moment it is returned into court, his authority ceases. *Raboteau v. Valetton*, 218.

SUBROGATION.

1. One who has loaned money to an insolvent, before his surrender, for the purpose of satisfying a judgment obtained against him, should prove the loan and subrogation and the receipt of the money by the judgment creditor, by a notarial act. C. C. 2156 § 2. But where the loan and subrogation were proved by authentic act, and parol evidence was admitted in the lower court, without objection, to establish the payment to the creditor, it will be too late to object to the nature of the proof of payment, after appeal.

Wilcox v. His Creditors, 346.

2. Where a purchaser at a sheriff's sale sells the same property, and, in the act of sale, declares, that he thereby "subrogates the vendee to all the rights and privileges acquired by the sheriff's sale," the latter will be considered as subrogated to the action of warranty to which his vendor was entitled.

Smith v. Wilson, 522.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the United States.*II. *Statutes of the State.*III. *Statutes of Pennsylvania.*I. *Statutes of the United States.*

- 1790, May 26. Authentication of Judicial Proceedings. *United States v. Bank of the United States*, 418.
- 1799, March 2, ss. 2, 4. Compensation of Collectors of Customs. *Prieur v. Morgan*, 292.
- 1804, ——— 27. Authentication of Non-judicial Records, &c. from other States and Territories. *Horn v. Bayard*, 259.
- 1822, May 7, s. 9. Compensation of Collectors of Customs. *Prieur v. Morgan*, 292.
- 1841, August 19. Bankruptcy. *Diggs v. Prieur*, 54. *Alling v. Egan*, 244.

II. *Statutes of the State.*

- 1805, April 10, s. 2. Coroner. *Cruzat v. Davis*, 264.
- 1807, March, 31, s. 10. Authorising Parish Judge to discharge duties of Coroner. *Ib.*
- 1808, February 10. Coroner. *Ib.*
- March 2. Relief of insolvent debtors in actual custody. *Gurtie v. Flood*, 166.
- 31, s. 6. Attorneys at law. *Chevalon v. Schmidt*, 91.
- 1810, March 24, s. 7. Registry of Notarial Acts. *Prevost v. Ellis*, 56.
- 1814, January 21, s. 6. Office of Coroner. *Cruzat v. Davis*, 264.
- 1817, February 20. Voluntary Surrender of property. *Barkley v. His Creditors*, 28. *Reed v. Powell*, 98.
- 1819, March 3. Lease. *State v. Judge of City Court, of New Orleans*, 394.
- 6. Incorporating Louisiana State Marine and Fire Insurance Company. *Musson v. Richardson*, 37.
- 1823, ——— 14. Protest of Bills and Notes. *Follain v. Dupré*, 454.

- 1833, March 27. Attorneys at law. *Chevalon v. Schmidt*, 91.
- 1835, February, 18, s. 6. Incorporating Mississippi Marine and Fire Insurance Company. *Mississippi Marine and Fire Insurance Company v. Bank of Louisiana*, 47.
- 1836, March 22, s. 1. Attorneys at law. *Chevalon v. Schmidt*, 91.
- April 1. Amending art. 305 of Civil Code, as to Family Meetings. *Beale v. Walden*, 67.
- 7, s. 9. Amending Code of Practice as to Sequestration. *Sellick v. Kelly*, 145.
- s. 10. ———, as to Interventions. *Hazard v. Agricultural Bank of Mississippi*, 326.
- 1827, March 1, s. 1. Duration of office of Coroner, &c. *Cruzat v. Davis*, 264.
- 13. Protest of Bills and Notes. *Follain v. Dupré*, 454.
- 1832, April 3. Opening and Improvement of Streets and Public Places in New Orleans. *Hullin v. Second Municipality of New Orleans*, 97.
- ss. 24, 27. Incorporating Union Bank of Louisiana. *Union Bank of Louisiana v. Marigny*, 209.
- 1834, March 10. Assurance of titles of purchasers at Judicial Sales. *Beale v. Walden*, 67.
- Family Meetings. *Ib.*
- 1835, — 19. Gaming. *Perry v. Commissioners of Clinton and Port Hudson Railroad Company*, 412.
- 1836, — 14. — *Ibid.*
- 1837, — 11. Assurance of titles of purchasers at Judicial Sales. *Beale v. Walden*, 67.
- 1838, — 10, ss. 4, 5. City Court of New Orleans. *State v. Judge of City Court of New Orleans*, 394.
- s. 3. Incorporating Firemen's Insurance Company of New Orleans. *Dixon v. Firemen's Insurance Company of New Orleans*, 252.
- Commissioners to take testimony in other States and Territories. *Dwight v. Splane*, 487.
- 1839, — 14, ss. 3, 4. Establishing Commercial Court of New Orleans. *Second Municipality of New Orleans v. Garland*, 387.
- 18, s. 2. Bonds of Auctioneers in New Orleans. *State v. Beard*, 243.
- 20, s. 6. Amending Code of Practice as to sequestrations. *Sellick v. Kelly*, 145.
- s. 13. Interrogatories to a third person under a *fi. fa.* *Mandion v. Firemen's Insurance Company of New Orleans*, 177. *Raboteau v. Valetton*, 218.
- 20. Amending Charter of Firemen's Insurance Company of New Orleans. *Mandion v. Firemen's Insurance Company of New Orleans*, 254.
- 28, ss. 2, 4. Clinton and Port Hudson Railroad Company. *Perry v. Commissioners of Clinton and Port Hudson Railroad Company*, 412.

- 1840, March 28, s. 2. Abolishing Imprisonment for debt. *Lindley v. Hagens*, 203.
- Amending act of same date abolishing imprisonment for debt. *Ibid.*
- Jurisdiction of Parish Court of Plaquemines. *State v. Parish Judge of Plaquemines*, 285.
- 1841, February 10, s. 10. Seizure of property by sheriff. *Sheldon v. New Orleans Canal and Banking Company*, 181.
- , March 8, ss. 1, 2. Clinton and Port Hudson Railroad Company. *Perry v. Commissioners of Clinton and Port Hudson Railroad Company*, 412.
- 1842, March 14, ss. 28, 29. Liquidation of Banks. *Gaillard v. Citizen's Bank of Louisiana*, 168.
- 26. Clinton and Port Hudson Railroad Company, *Perry v. Commissioners of Clinton and Port Hudson Railroad Company*, 412.
- 1843, April 5, s. 2. Liquidation of Property Banks—Compensation. *Citizen's Bank v. Leveé Steam Cotton Press Company*, 286.
- 1844, February 19. Interest. *West v. Plain*, 292.
- , March 25, s. 6. Liquidation of debts of the State. *Perry v. Commissioners of Clinton and Port Hudson Railroad Company*, 412.

III. Statutes of Pennsylvania.

- 1834, April 14. Authorising Prothonotaries to sign judgments of Courts of Common Pleas. *Horn v. Bayard*, 259.
- 1842, March 5. Assignments of property by Banks. *Ibid.*

STOCKHOLDER.

1. A stockholder in an insolvent company, a part of whose subscription is unpaid, cannot, by a donation to an insolvent individual, made to get rid of his liability for such unpaid stock, avoid responsibility as a stockholder. A creditor, having a *feri facias* against the company, may proceed against him in the manner pointed out by the 13th section of the act of 20 March, 1839, and, on proving that the donation was not real, recover judgment for any balance due on the stock.

Mandion v. Firemen's Insurance Company of New Orleans, 177.

2. Where stock, on which a balance was still due on account of the original subscription, was transferred to a third person merely to secure a loan, and, on payment of the loan, was re-transferred, such third person will not be liable to creditors of the company for any balance due on the shares, where the transfer, though an absolute one on its face, was not signed and accepted so as to preclude him from showing that it was intended only as a security.

Mandion v. Firemen's Insurance Company of New Orleans, 178.

See FIREMEN'S INSURANCE COMPANY OF NEW ORLEANS.

SUCCESSIONS.

1. The provision of the Code of 1808 (book 3, title 1, art. 59), that the place where the party died is that in which his succession shall be considered to be

opened, having been repealed by the Code of 1825, which declares (art. 929) that the succession shall be considered as opened in the parish in which the deceased resided, if he had a fixed domicil in the State: *Held*, that the death of the party must be considered as irrevocably vesting the jurisdiction, and that, if the death occurred while the old law was yet in force, the jurisdiction must be determined by it, though no proceedings were had before the promulgation of the new law; but that where a parish has been divided since the death, the jurisdiction will depend upon the fact of the court of the original parish having taken any steps, or assumed jurisdiction in relation to the *mortuaria*, before the division; if it has, its jurisdiction will not be divested by the division; otherwise jurisdiction will belong, under art. 929 of the Civil Code, to the court of the parish which embraces the residence of the deceased.

Beale v. Walden, 67.

2. A tutor, as such, without letters of administration, has no authority to administer a succession in which his pupil has an eventual or residuary interest. Such a succession must be administered as an entire thing, for the advantage of the creditors, as well as of the beneficiary heirs entitled to the residue after the payment of the debts. *Ib.*
3. The plaintiff in an action before a District Court assigned his claim therein to several creditors, notifying the defendants; other of his creditors, having obtained judgments against him, levied their executions, in the hands of the defendants, on his interest in the suit. Defendant having died pending the suit, his executors took a rule in the District Court on the assignees and seizing creditors to determine their respective ranks, and for the purpose of distributing among them the amount of the judgment which had been rendered in favor of the plaintiff, which they deposited with the clerk of the District Court: *Held*, that the amount so deposited is a debt in money due by the succession of the defendant to the assignees or seizing creditors; that the Probate Court, in which the succession of the defendant was opened, has exclusive jurisdiction to determine their rights and privileges on the sums due by the estate of the deceased (C. P. 924 § 13, 983); and that the assignees or seizing creditors, though they have submitted below to the jurisdiction of the District Court, may demand, on appeal, the nullity of the judgment of the latter, on the ground of a want of jurisdiction. C. P. 606 § 3, 608. The consent of parties cannot give jurisdiction, when wanting *ratione materiae*. It can only confer it, where mere personal rights are involved; or where a defendant is sued before another judge than the one of his domicil, and he nevertheless pleads to the merits. C. P. 93. *Fleming v. Hiligsberg*, 77.
4. An heir cannot be affected by any claim of an executor, unless personally cited to contest it. *Baldwin v. Carleton*, 109.
5. A minor heir is not legally represented by his tutor, on an application for the homologation of the accounts of the executors, where the tutor, as one of the executors, claims, with his co-executor, a sum for commissions on the estate of the deceased. The minor should have been represented by his under-tutor, or the homologation of the accounts of the executors will not form *res judicata* as to him. *Ib.*

6. Executors are jointly and severally responsible for the property committed to their charge. C. C. 1674. *Baldwin v. Carleton*, 109.
7. A creditor of a residuary legatee, or devisee, of one whose succession is being administered in another State, cannot attach specific property of the succession, while still in possession and under the control of the executor, and the estate not yet fully administered. The property must be considered as the executor's, for the purposes of his trust. *Thornhill v. Christmas*, 201.
8. An executor cannot grant a mortgage on any part of his testator's estate; nor can a Probate Court authorise him to do so, though for the purpose of releasing other property of the succession already mortgaged, with the view to sell it. *Pilié v. Citizen's Bank of Louisiana*, 248.
9. The jurisdiction of District Courts extends to the liquidation of claims against successions when pleaded in compensation or reconvention, so far as the conflicting claims extinguish each other; but for any balance ascertained to be due to the defendant he must resort to the court in which the succession was opened, that his rank may be ascertained contradictorily with the other creditors, and his claim placed in its proper place on the *tableau* of distribution. *Thomson v. Mylne*, 349.
10. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, in *solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball v. Hodge*, 390.
11. One who has managed all the business of a succession, under an agreement by which a third person consented to become the surety of the plaintiff as administratrix, on the condition of her trusting the sole management of the estate to the former, will be allowed the usual commissions of an administrator, as an offset, *pro tanto*, against any claim by the plaintiff for a sum coming to her, as the widow of the deceased, from the succession. *Ib.*
12. Payments to the creditors of a succession, made without an order from the Court of Probates, are irregular; but when they exonerate the estate from legal charges, and thereby benefit the heirs, the latter must show that such charges are unjust, unfounded, or excessive, or the payments will be allowed to the party by whom they were made. *Rouly v. Bérard*, 478.
13. Parol evidence is inadmissible to prove the appointment of a curator to a succession, unless it be first shown that the record of his appointment has been lost or destroyed. *Ib.*
14. The provisions of arts. 334, 335, 337 of the Civil Code, relate to the sale of property belonging exclusively to minors, not to that of the property of successions, in the hands of an administrator, in which the heirs, whether minors or of age, have but a residuary interest, which can be ascertained only by a full administration. C. C. 1042, 1051. *Richard v. Deuel*, 508.

SUMMARY PROCEEDINGS.

Where a purchaser of land at a sheriff's sale does not, at the time, exercise his right of requiring the sheriff to put him in possession, but permits a third person to occupy a part of the premises, he cannot afterwards, by a petition, ad-

dressed to the judge of the court from which the execution was issued in chambers, obtain, in a summary way, an order directing the sheriff to put him possession. *Bigler v. Brashear*, 500.

SURETY.

1. Where the evidence induces the belief that the goods, for the price of which defendants are sued, were sold on their credit, they will be bound therefor, though there be no proof of an express guarantee on their part.

Montross v. Hillman, 87.

2. Property, provisionally seized, having been released on the execution of a bond with surety, plaintiff obtained judgment, and issued a *fi. fa.*, which was returned "no property found after demand of the parties." On a rule against the surety, to show cause why execution should not be issued against him, the latter introduced a witness who stated that he had notified plaintiff and the sheriff that the property originally seized was within the jurisdiction of the court, and requested him to seize it, informing him where it was. *Held*: That the rule should be made absolute. *Walden v. Philips*, 123.

3. A non-resident debtor arrested under the 2d section of the act of 28 March, 1840, having been released on executing a bond, in pursuance of the first section of the amendatory act of the same date, with surety, the condition of which was that he should not depart from the State within three months without leave of the court, on a rule against the bail to show cause why he should not be condemned to pay the amount of the judgment, it was proved that the debtor had left the State within the three months, and that a *fi. fa.* against him had been returned *nulla bona*, but that he was present in court on the trial of the case, and offered to surrender himself in discharge of his bail: *Held*: that the offer to surrender cannot avail the surety, as, since the acts of 1840, no officer had authority to take the principal into custody on such surrender; and that the departure of the latter from the State, within the three months, and the return of a *fi. fa.* against him unsatisfied, fixed the liability of the surety.

Lindley v. Hagens, 204.

4. Indulgence granted by the state treasurer to an auctioneer, by taking his notes for a sum due to the State for taxes on sales made by him, will not discharge the sureties on his official bond. The treasurer has authority to collect whatever is due to the State, but not to receive any thing but money in payment of debts due to it, nor to extend the time of payment, or novate any debt.

State v. Beard, 243.

5. No recourse can be had on the sureties in an appeal bond, until it be clearly shown by the creditor, that the proceeds of the sale of all the estate and effects of the principal have proved insufficient to discharge his demand. So, where a husband appeals from a judgment against him for a community debt, and dies, leaving children and a widow who accepts the community, the sureties on the appeal bond will be liable only in case the judgment is not satisfied by the widow and heirs so far as they are respectively bound for it, and cannot be satisfied by the sale of all their property, real and personal, liable for its payment. *Saulet v. Trepagnier*, 266.



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6. Where a defendant consented to become surety for the plaintiff as administratrix of her husband's succession, on condition that she would leave the whole management of the estate to his co-defendant, he will be responsible, *in solido* with the latter, for any amount that may be due from him to the plaintiff, for her share in the community of *acquets*. *Ball v. Hodge*, 390.

TREASURER OF THE STATE.

See SURETY, 4.

TUTOR.

See MINOR, 1, 3, 5, 6, 7.

UNION BANK OF LOUISIANA.

See BANK 6.

WARRANTY.

See SALE, III.

END OF VOLUME XI.

ERRATA.

Page 4, line	15 from bottom, for security	substitute surety.
87 —	5 from top, for C. C.	— C. P.
123 —	7 ————— security	— surety.
159 —	9 ————— matters of	— matters in.
181 —	14 ————— C.	— P.
195 —	1 at top, for 1794	— 1974.
281 —	20 from top, for defendants	— defendant.
285 —	8 ————— } 4	— s. 2.
286 —	11 from bottom, for New Orleans	— Louisiana.
495 —	5 from top, for demand	— demanded.
512 —	12 from bottom, for Henry E.	— Henry C.
516 —	16 from top, for irrelevant	— irrelevant.
526 —	13 ————— book 3	— book 2.
529 —	18 ————— insert inter vivos after donation.	
559 after line 12 from top insert—3.	<i>Persons Indebted to, or Possessing Property of Defendant.</i>	